

No. 04-0074C,
into which has been consolidated
No. 04-0075C
(Chief Judge Hewitt)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT
OF DAMAGES DUE, AND ISSUES TO BE ADDRESSED, ON REMAND,
AND MOTION FOR ENTRY OF JUDGMENT UPON THE EXISTING RECORD

OF COUNSEL:

JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

MARIAN E. SULLIVAN
Senior Trial Counsel

LISA L. DONAHUE
ANTHONY W. MOSES
SCOTT SLATER
Trial Attorneys
Commercial Litigation Branch

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

HAROLD D. LESTER, JR.
Assistant Director

SETH W. GREENE
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Attn: Classification Unit, 8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Tele: (202) 353-4175
Fax: (202) 307-2503

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Attorneys for Defendant

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PACIFIC GAS & ELECTRIC COMPANY,)	
)	
Plaintiff,)	
)	
v.)	No. 04-0074C, into which has been
)	consolidated No. 04-0075C
THE UNITED STATES,)	(Chief Judge Hewitt)
)	
Defendant.)	

DEFENDANT’S RESPONSE TO PLAINTIFF’S STATEMENT
OF DAMAGES DUE, AND ISSUES TO BE ADDRESSED, ON REMAND,
AND MOTION FOR ENTRY OF JUDGMENT UPON THE EXISTING RECORD

Pursuant to the Court’s scheduling order dated January 15, 2009, and the Court’s March 30, 2009 order granting the Government’s motion for an enlargement of time, defendant, the United States, respectfully submits the following response to “Plaintiff PG&E’s Statement of Damages Due, And Issues To Be Addressed, On Remand,” which plaintiff, Pacific Gas & Electric Company (“PG&E”), filed on February 20, 2009. In so doing, we respectfully request that the Court reject out-of-hand the following two categories of damages claimed in PG&E’s statement of damages as barred from consideration by this Court on remand under the “mandate rule”: (1) \$889,517 in costs associated with PG&E’s investment in Private Fuel Storage, LLC (“PFS”); and (2) \$919,420 in costs for removing the ventilation stack at its Humboldt Bay Power Plant (“HBPP”). Similarly, we request that the Court decline to revisit PG&E’s previously rejected “exchanges” theory, which PG&E attempts to resurrect on remand in part to support its additional claim for \$4.7 million in HBPP “SAFSTOR” costs, because the Federal Circuit’s decision in this case did not upset the Court’s ruling on this matter. We further request that the Court enter judgment upon the existing record in the Government’s favor upon the following three categories of damages claims: (1) \$1,599,841 in HBPP independent spent fuel storage

installation (“ISFSI”) costs relating to its storage of Greater-Than-Class-C radioactive waste (“GTCC”) at HBPP; (2) \$38,678,000 in HBPP SAFSTOR costs associated with maintaining its GTCC in the spent fuel pool for 2000 through 2004; and (3) \$1,451,091 in costs for a storage options evaluation for its Diablo Canyon Power Plant (“DCPP”).

With respect to the remaining categories of damages claims, we request that the Court decide these items based upon the existing evidentiary record in this remand proceeding. In support of our motion for judgment upon the existing record, we rely upon the following brief and appendix, this Court’s original damages opinion in this case, the United States Court of Appeals for the Federal Circuit’s decision on appeal in this case, the documentary and testimonial evidence adduced at trial, and the pleadings and statements filed by the parties in this case, including those filed in the initial action before the Court.

SUMMARY OF ARGUMENT

PG&E seeks on remand damages that it claims to have incurred through December 31, 2004, associated with the storage of spent nuclear fuel (“SNF”) and high-level radioactive waste (“HLW”) at its HBPP and DCPP for eight different categories of damages claims. Three of these categories of claims should be rejected outright by the Court as not incorporated within the Federal Circuit’s mandate in this case. With regard to the remaining five categories of claims that are within the scope of the mandate, the Court can and should decide whether PG&E is entitled to these costs based upon the existing record in this remand proceeding. In so doing, the Court should find that, based upon that existing record, PG&E is not entitled to HBPP’s GTCC SAFSTOR and ISFSI storage costs or the costs of DCPP’s storage options evaluation. With regard to DCPP’s ISFSI and temporary rack costs, PG&E will have to present further analysis

based upon the existing record to establish that it would not have incurred these costs had DOE timely performed under the Standard Contract based upon the acceptance allocations set forth in the 1987 Annual Capacity Report (“ACR”).

Ascertainment of whether the costs at issue in this case were caused by DOE’s delay necessarily requires consideration of what DOE’s actual obligations regarding SNF and HLW acceptance after January 31, 1998 were and the actions that PG&E would have undertaken had DOE timely performed. The Federal Circuit has ruled that the 1987 ACR acceptance rates are to be applied in calculating damages in the SNF cases pending before this Court. Pacific Gas & Elec. Co. v. United States, 536 F.3d 1282, 1292 (Fed. Cir. 2008) (“PG&E”). The Federal Circuit also has ruled that, in 1989, the United States Nuclear Regulatory Commission (“NRC”) converted GTCC into HLW, which DOE was obligated to accept “with the SNF.” Yankee Atomic Elec. Co. v. United States, 536 F.3d 1268, 1278 (Fed. Cir. 2008) (“Yankee Atomic”). In this remand proceeding, the Court must hold PG&E to its burden to establish that it is entitled to its damages claims under the parameters established by these rulings.

As noted above, PG&E seeks to recover on remand two damages claims that are outside the Federal Circuit’s mandate in this case. Specifically, with regard to PG&E’s reclaimed PFS costs, this Court already rejected that claim in its original damages opinion on October 13, 2006, as “highly speculative and uncertain,” and PG&E did not appeal that decision. PG&E also reclaims its HBPP ventilation stack removal costs, costs which this Court already found were incurred “in 1998 primarily for significant safety reasons” and, therefore, were neither foreseeable to nor caused by DOE’s breach. Like its PFS ruling, the Court’s ruling on the HBPP

stack removal claim was not related to which rate of acceptance was applied in the Court's initial decision, and was not appealed.

Likewise, this Court should decline PG&E's strained invitation to reconsider PG&E's already rejected "exchanges" theory – and it should reject outright PG&E's three other newly raised theories – to increase its claim for HBPP SAFSTOR costs by \$4.7 million and to remedy its DCPD SNF storage restrictions. The Federal Circuit's mandate that this Court calculate PG&E's damages using the 1987 ACR acceptance rates does not in any way alter this Court's prior rulings on the matter of exchanges – that is, that PG&E had not proved by preponderant evidence at trial that it would have or could have used exchanges, and that Frank Graves's hypothetical exchanges model was unduly speculative. These rulings were not dependent upon which rate of acceptance was applied in the Court's decision and, therefore, fall outside the scope of this remand proceeding.

With regard to PG&E's remaining five categories of damages claims, the Court can – and should – decide these claims based upon the existing record in this remand proceeding. With regard to the remaining HBPP damages claims, PG&E seeks to recover its SAFSTOR and ISFSI costs associated with the storage of GTCC. Yet, the existing record evidence indicates that PG&E would not have removed its HBPP GTCC from the spent fuel pool prior to 2000 and did not remove it until after 2004 – or after the claim period in this case. Thus, even if DOE had begun acceptance of SNF and HLW in 1998 under the Standard Contract at the rates contained in the 1987 ACR, PG&E still would have incurred these costs had DOE timely performed.

To support each of these damages claims, PG&E must present a damages analysis that takes into account DOE's acceptance of GTCC as HLW in establishing when its SNF and HLW

(in the form of GTCC) would have been accepted in the non-breach world. To date, PG&E has not even attempted to present such an analysis. In fact, in its statement of damages, PG&E explicitly refuses to take into account the extent to which DOE's obligation to accept GTCC affects (1) when DOE would have accepted SNF from PG&E, and (2) when DOE would have accepted the GTCC that PG&E already has generated. While we continue to believe that the Federal Circuit misinterpreted the scope of DOE's obligations pursuant to the Standard Contract with respect to GTCC, the current state of the law requires that each SNF plaintiff (including PG&E) establish when its SNF and HLW (in the form of GTCC) would have been accepted had DOE timely performed. Moreover, before PG&E can recover the costs of its GTCC storage, it must demonstrate that DOE would have accepted its GTCC under the contractually-required "oldest waste first" schedule.

Similarly, PG&E has, to date, not established that it is entitled to its damages claims for the DCPD ISFSI and temporary storage racks. Indeed, aside from unsupported statements of counsel in its statement of damages, PG&E has not established that it would not have needed to undertake some additional storage at DCPD had DOE timely performed, given the Court's finding after the initial trial that DCPD's spent fuel pool would have reached capacity in 2006. By failing to present such an analysis necessary to support its damages claims, PG&E cannot meet its burden to establish that DOE's breach caused its damages in this case. Finally, with regard to the costs incurred to study storage options at DCPD, the required application of the 1987 ACR rates should not change the Court's prior determination that PG&E would have undertaken this analysis in the regular course of its business.

BACKGROUND

I. THE INITIAL TRIAL AND DAMAGES OPINION IN THIS CASE

At trial, PG&E put forth a single theory of damages, based upon an improper interpretation of the Standard Contract, that the contract required DOE to accept SNF at a rate that would preclude the need for additional at-reactor storage after 1998. Moreover, at trial, PG&E offered no evidence whatsoever – either testimonial or documentary – showing the steps that it would have taken had DOE accepted SNF and HLW in accordance with the rates set forth in the 1987 ACR. Instead, PG&E merely presented evidence in support of the alleged two-part obligation and the 3,000 metric tons uranium (“MTU”)/year acceptance rate. Pacific Gas & Elec. Co. v. United States, 73 Fed. Cl. 333, 386 (2006) (“PG&E I”) (rejecting plaintiff’s argument that defendant was required to perform under the Standard Contract “using an acceptance rate in accordance with the alleged two-part obligation, or 3,000 MTU/year, beginning on January 31, 1998”). In sum, the Federal Circuit remanded this case for further proceedings based upon a rate of SNF/HLW acceptance that PG&E neither referenced nor advanced in support of its claim for damages before this Court.

For its part, the Government argued, as it has done consistently in SNF cases, that the Standard Contract does not contain a specific rate of acceptance and, instead, that the rate of acceptance for the first 10 years of DOE’s program should be measured in accordance with the contractual mechanism set forth in the contract. Specifically, we have maintained that the rates in the 1991 ACR define DOE’s obligations for the first 10 years of SNF/HLW acceptance.

After consideration of these arguments and the evidence presented at trial, the Court determined that, had DOE performed in 1998, it would have accepted the amounts of fuel set

forth in the 1991 ACR. PG&E I, 73 Fed. Cl. at 399-400. Based upon this acceptance schedule, the Court found that DOE would have accepted all of the SNF from HBPP by the end of 2001 and would not have accepted any SNF from DCPD prior to 2013. Id. at 400 n. 56. Based upon these determinations, the Court further found that PG&E would not have needed to construct an ISFSI at HBPP. Id. at 418. In examining the HBPP ISFSI licensing and construction costs incurred in the claim period, the Court made deductions for costs that were incurred irrespective of DOE's breach. Based upon its finding that GTCC was not covered by the Standard Contract, the Court also deducted HBPP's ISFSI damages award by one-sixth to account for its GTCC storage costs. Id. at 421. The Court also determined that, based upon the removal of HBPP's SNF by the end of 2001, it would not have incurred SAFSTOR costs to operate HBPP's spent fuel pool from January 1, 2002 through December 31, 2004. Id. at 413. The Court declined to further reduce HBPP's SAFSTOR damages award "due to the lack of any obligation on the part of the [G]overnment to collect GTCC [w]aste from Humboldt Bay." Id. at 416.

Based upon its determination that DOE would not begin acceptance of SNF from DCPD "until after 2007, and likely not before approximately 2013," the Court concluded that "PG&E would have been required in the ordinary course of business to construct additional at-reactor storage at Diablo Canyon in order to prevent it from reaching capacity in 2006" Id. at 425. Similarly, the Court determined that the need to construct a temporary rack for the storage of additional fuel in the DCPD spent fuel pool was not caused by DOE's failure to perform at the 1991 ACR rates. Id. at 427-28. Finally, with regard to the study of storage options at DCPD, the Court found that, "[b]ecause Diablo Canyon would reach capacity in or around 2006, absent the

[G]overnment's partial breach, PG&E still would have been obligated in the regular course of its business to evaluate its storage options at Diablo Canyon." Id. at 428.

With regard to PG&E's damages claim for its investment costs in PFS, the Court rejected that claim as "highly speculative and uncertain" and, therefore, neither foreseeable to nor caused by DOE's breach. Id. at 430. Similarly, the Court determined that PG&E decided "to remove [its HBPP] ventilation stack in 1998 primarily for significant safety reasons" and related economic considerations that were wholly independent of DOE's breach. Id. at 422. Finally, the Court excluded Frank Graves, who was proffered by PG&E as an expert on the rate at which DOE would have accepted SNF under the contract, and as a witness with regard to Mr. Graves's hypothetical model of how exchanges of SNF at certain allocations would have operated in a "non-breach" world. Id. at 436. In so doing, the Court excluded Mr. Graves as an expert for reasons wholly independent from any acceptance rate applied by the Court in its decision. Further, the Court, after trial, ruled that PG&E had failed to prove by preponderant evidence that it would have or even could have engaged in exchanges. Id. at 348, 413.

II. THE FEDERAL CIRCUIT'S DECISIONS IN *PG&E* AND *YANKEE ATOMIC*

On August 7, 2008, the Federal Circuit issued its decision on appeal from this Court, along with decisions in two other SNF cases on appeal, Yankee Atomic and Sacramento Municipal Utility District v. United States, 2008 WL 3539880 (Fed. Cir. Aug. 7, 2008) ("SMUD") (unpublished). Critically, among the conclusions drawn by this Court that the Federal Circuit in this case expressly deemed to "adhere[] to standard contract interpretation principles" was the Court's determination that the Standard Contract does not impose upon DOE "an obligation to accept SNF/HLW at a rate that would prevent the utilities from bearing the

costs of additional on-site waste storage facilities after January 31, 1998.” PG&E, 536 F.3d at 1287-89. The Federal Circuit thus rejected the qualitative standard that PG&E advanced in this case and held that the rate of SNF acceptance required by the Standard Contract could only be determined in accordance with what the Court referred to as the “ACS process.” Id. at 1289-90. As a result, the only “salient question” for the Court to answer was “which ACS to use.” Id. at 1290.

The Federal Circuit ultimately adopted the rate contained in the 1987 version of the ACR. According to the Court, that version of the ACR, unlike subsequent versions, “contemplated full and timely performance” and, therefore, “present[ed] the most reasonable measure of the contractual acceptance rate.” Id. at 1291-92. Thus, while the Federal Circuit chose a rate different than that advocated by either PG&E or the Government, it found that this Court’s method for determining the appropriate rate was correct. Id. at 1289 (“The trial court’s approach, up to this point, adhered to standard contract interpretation principles.”). The Federal Circuit then remanded the case to this Court to calculate damages according to the spent fuel acceptance allocations that PG&E would have received pursuant to those rates. Id. at 1292; see also Yankee Atomic, 536 F.3d at 1273-74; SMUD, 2008 WL 3539880, at *4.¹

¹ As this Court may be aware, the Government filed a motion for reconsideration with the Federal Circuit on October 27, 2008, requesting that the appellate court recall its issuance of the mandates and permit the Government to file petitions for rehearing and/or en banc review of the decisions in PG&E, Yankee Atomic, and SMUD. The Government nevertheless recognizes that, until and unless the Federal Circuit’s decisions in PG&E, Yankee Atomic, and SMUD are vacated by the panels that issued them or by the Federal Circuit en banc, this Court is bound by those decisions. As of the date upon which this response was filed, the Government’s motion for reconsideration remains outstanding.

The Federal Circuit held that the SNF plaintiffs (including PG&E) have the burden to apply this contractual acceptance rate and introduce evidence into the record to demonstrate their condition given full DOE performance, so that the trial court may “perform the necessary comparison between the breach and non-breach worlds.” Yankee Atomic, 536 F.3d at 1273. This assessment, the Federal Circuit held, is necessary to accurately assess damages. Id. Thus, in both the Yankee Atomic and SMUD cases, the Federal Circuit vacated the trial courts’ decisions, and remanded for further proceedings, because the trial courts had failed to hold plaintiffs to their burden of demonstrating causation. Yankee Atomic, 536 F.3d at 1274; SMUD, 2008 WL 3539880, at *3-4.

Finally, in Yankee Atomic, the Federal Circuit ruled that GTCC fell within the Standard Contract’s definition of HLW and, therefore, that DOE was obligated to accept it with SNF. 536 F.3d at 1278-79. In its remand instructions in that case, the Federal Circuit noted that it had determined that the Standard Contract requires DOE to accept SNF and HLW in accordance with the 1987 ACR process. Id. at 1274. The Federal Circuit then incorporated that holding into its decision in this case:

In the companion case to this appeal, [Yankee Atomic], this court discusses at length the requirements of the Standard Contract with respect to GTCC waste. This court incorporates that section into this decision as well. Therefore, the Court of Federal Claims will have the opportunity to account for GTCC waste disposal on remand.

PG&E, 536 F.3d at 1292-93 (emphasis added). Accordingly, this Court must require PG&E to account for the acceptance of GTCC in establishing causation for its damages in this remand proceeding.

ARGUMENT

I. PG&E CANNOT RAISE CLAIMS, AND ARGUMENTS IN SUPPORT THEREOF, THAT ARE BEYOND THE SCOPE OF THIS REMAND PROCEEDING

A. The “Mandate Rule” Acts To Bar PG&E From Reasserting Damages Claims On Remand That Were Not Challenged On Appeal To The Federal Circuit

The law in this Court is clear that a party is barred from raising an issue on remand that, while “clearly implicated in the initial decision of the district court,” was not raised on appeal. Tronzo v. Biomet, Inc., 236 F.3d 1342, 1349 (Fed. Cir. 2001), cert. denied, 534 U.S. 1035 (2001). The Federal Circuit has explained that, under the “mandate rule,” an issue that was within the scope of the trial court’s initial judgment is necessarily incorporated within the scope of the court of appeals’ mandate. Id. at 1348; see also Amado v. Microsoft Corp., 517 F.3d 1353, 1360 (Fed. Cir. 2008) (under mandate rule, “[a]n issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived”).² Once incorporated within the scope of the mandate, the issue is foreclosed from further review on remand to the trial court. Tronzo, 236 F.3d at 1348. As such, if a party fails to raise an issue on appeal, the mandate acts to bar the party from raising the issue on remand.³

² As the Federal Circuit explained in Tronzo, while various courts identify the doctrine by differing monikers (e.g., “waiver” and “law of the case”), the Federal Circuit concluded that the issue in that case – a remand case – was “best labeled and treated as an application of the mandate rule.” 236 F.3d at 1348 n.1. Nevertheless, regardless of its label, the effect is, in essence, the same. That is, once a contested issue is addressed by the trial court, the issue is ripe for challenge on appeal. If a party then fails to challenge the contested issue on appeal, the appellate court’s mandate acts to preclude the party from raising that issue on remand. See id. at 1348-49.

³ Similarly, under the doctrine of law of the case, which is a corollary to the mandate rule, see United States v. Polland, 56 F.3d 776, 779 (7th Cir. 1995), if a party fails to

As more directly addressed below in this response with respect to PG&E's specific damages claims and issues, PG&E seeks to improperly stretch the scope of the Federal Circuit's mandate in this case. On remand, this Court "is free to take any action that is consistent with the appellate mandate, as informed by both the formal judgment issued by the court and the court's written opinion." Florida Power & Light Co. v. United States, 56 Fed. Cl. 555, 556 (2003) (emphasis added), vacated and remanded on other grounds, 103 F. App'x 669 (Fed. Cir. 2004) (citing Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1484 (Fed. Cir. 1998)). The Court's "actions on remand should not be inconsistent with either the letter or the spirit of the mandate." Florida Power, 56 Fed. Cl. at 556 (citing Laitram Corp. v. NEC Corp., 115 F.3d 947, 951 (Fed. Cir. 1997)).

The Federal Circuit's mandate in this case makes clear that this remand proceeding is about awarding PG&E damages based upon the acceptance rates set forth in the 1987 ACR and the SNF and HLW acceptance allocations that PG&E would have received pursuant to those rates. PG&E, 536 F.3d at 1292; see also Yankee Atomic, 536 F.3d at 1274; SMUD, 2008 WL 3539880, at *3-4. Importantly, the Federal Circuit also instructed that any damages award on remand must take into account DOE's acceptance of GTCC under the Standard Contract. PG&E, 536 F.3d at 1293. Accordingly, this remand proceeding is about when DOE would have

raise an issue on appeal that was decided by the trial court, the court's finding on that issue becomes the law of the case. Suel v. Sec'y of HHS, 192 F.3d 981, 984 (Fed. Cir. 1999) ("Law of the case is a judicially created doctrine, the purpose of which is to prevent relitigation of issues that have been decided.") (citation omitted). If the trial court thereafter revisits that same issue on remand, the court's decision will be beyond the scope of the remand and prohibited by the mandate rule. See Tronzo, 236 F.3d at 1348-49.

removed the SNF and HLW (including GTCC) stored at PG&E's HBPP and DCPD had DOE timely performed and what costs, if any, PG&E would have avoided.

B. PG&E Seeks To Recover On Remand Two Categories of Damages Claims That Are Not Within The Scope Of The Federal Circuit's Mandate In This Case

1. PG&E Is Barred From Recovering Its PFS Costs On Remand Under The "Mandate Rule"

PG&E reclaims on remand \$899,517 in PFS costs. This Court already addressed this very issue in the first trial and correctly resolved it against PG&E. In so doing, the Court explained that, based upon the preponderance of the evidence adduced at trial, it was unwilling to rule differently on this issue than the Federal Circuit in Indiana Michigan Power Company v. United States, 422 F.3d 1369, 1376 (Fed. Cir. 2005), under essentially the same circumstances:

Plaintiff's participation in both PFS and the Mescalero Project were not the foreseeable result of, or caused by, defendant's partial breach of the Standard Contract. The evidence illustrates that plaintiff entered into the highly speculative PFS venture in the early 1990s in the ordinary course of business, while it continued to be possible that DOE would perform the Standard Contract beginning on January 31, 1998. In addition, it appears that plaintiff entered the Mescalero Project in the ordinary course of business primarily as a contingency or insurance-policy type backup to [its] primary storage program. It was not the [G]overnment's breach or its anticipated breach that caused PG&E to enter into these [highly speculative and uncertain] ventures.

PG&E I, 73 Fed. Cl. at 429-30 (internal citations and quotations omitted). PG&E did not appeal this Court's decision regarding PFS to the Federal Circuit.

In its statement of damages, PG&E contends that the Federal Circuit's decision in this case clearly renders this Court's purported "primary reason" for rejecting these costs invalid. See Pl.'s Stmt. at 27. Specifically, PG&E argues that the Court's finding that PG&E incurred these PFS expenditures in the early 1990s "in the ordinary course of business," rather than in

response to “DOE’s impending breach,” cannot stand because the Federal Circuit in this case stated that DOE performance was no longer a reasonable possibility at the time that DOE published the 1991 ACR. Id. As a threshold point, PG&E’s depiction of the Court’s finding here omits that part of the sentence immediately preceding the “in the ordinary course of business” language quoted above. The beginning of that sentence reads: “The evidence illustrates that plaintiff entered into the highly speculative PFS venture in the early 1990s in the ordinary course of business” PG&E I, 73 Fed. Cl. at 430 (emphasis added). In any event, PG&E’s heavy reliance upon this finding from the Federal Circuit’s decision, together with its dissembling of this Court’s rejection of these costs, is inapposite. In its initial decision, the Court rejected these PFS costs as “highly speculative and uncertain” and neither the foreseeable result of nor caused by DOE’s breach:

[The PFS costs] were not foreseeable by the [G]overnment at the time of the parties’ contracting, and were not the foreseeable result of the [G]overnment’s failure to begin collecting the utilities’ spent fuel by January 31, 1998.

PG&E I, 73 Fed. Cl. at 430 (emphasis added) (citing Indiana Michigan, 422 F.3d at 1373) (“[R]ecovery for speculative damages is precluded.”)); see also Old Stone Corp. v. United States, 450 F.3d 1360, 1375 (Fed. Cir. 2006) (“[P]laintiff’s loss must have been foreseeable to the party in breach at the time of contract formation.”) (emphasis added); Restatement (Second) of Contracts, § 351(1) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”) (emphasis added). Accordingly, PG&E’s suggestion that its participation in PFS was “reasonably foreseeable” at least by 1991 – at the time that DOE published the 1991 ACR – is of no moment.

More importantly, PG&E's attempt to resurrect its PFS claim on remand squarely conflicts with the scope of the mandate. See Tronzo, 236 F.3d at 1347-49; see also Florida Power, 56 Fed. Cl. at 563. That issue was "clearly implicated in [this Court's] initial decision" and, therefore, was within the scope of the Court's initial judgment. Tronzo, 236 F.3d at 1349. As such, that issue was necessarily incorporated into the scope of the Federal Circuit's mandate in this case, precluding further review of the issue on remand to this Court. Id. at 1348. Because PG&E failed to appeal this aspect of the Court's judgment, the Federal Circuit's mandate acts to preclude PG&E from raising this issue on remand. Amado, 517 F.3d at 1360; Tronzo, 236 F.3d at 1349. Accordingly, the Court should reject PG&E's claim for PFS costs.

Even if the Court were not barred by the mandate rule, the Court's ruling on this issue from its initial decision should still stand. PG&E's renewed attempt to claim these PFS costs does nothing to overcome this Court's prior ruling on this issue. For instance, the Court should not even entertain PG&E's contention that the Court's decision in Northern States Power Company v. United States, 78 Fed. Cl. 449 (2007), appeal pending, Nos. 2008-5037, 2008-5041 (Fed. Cir. docketed Feb. 11, 2008), with which we respectfully disagree and have appealed, supports any award of PFS damages. See Pl.'s Stmt. at 28. Indeed, Northern States is easily distinguishable from this case, including where PG&E suggests that the cases are factually similar. First, Northern States, which conflicts with all other SNF decisions on this issue, is currently on appeal and, therefore, the award of PFS costs in that case, which we believe to be erroneous, is not final. See Indiana Michigan, 422 F.3d at 1376 (affirming trial court's decision that PFS costs were speculative and unforeseeable); see also Southern Nuclear Operating Co. v. United States, 77 Fed. Cl. 396, 445 (2007) ("[C]oncerns of speculativeness and foreseeability [as

to plaintiff's investment in PFS] are no less present in this case than they were in Indiana Michigan.”); PG&E I, 73 Fed. Cl. at 430. Second, in Northern States, the State of Minnesota stalled the licensing of plaintiff's dry storage facility. Northern States, 78 Fed. Cl. at 465. In consideration of that fact, the Court determined that the utility had no option other than pursuing PFS for the storage of its spent fuel, and awarded PFS damages. Id. In this case, there is no evidence that PG&E was being actively prevented from constructing dry storage when it invested in PFS in the early 1990s. Rather, this Court found that PG&E understood that this business venture represented a “contingency or ‘insurance-policy type backup’” storage program. Id. Further, unlike the utility in Northern States, who actively pursued PFS as its “only option” through at least 2003, see Northern States, 78 Fed. Cl. at 465-66 (emphasis added), PG&E decided by 1995 to discontinue its contribution to PFS as an equity participant. PG&E I, 73 Fed. Cl. at 429-30.

Finally, PG&E suggests that the Northern States Court awarded PFS damages in that case simply because the utility provided testimony at trial that its “participation in the project was appropriate.” Pl.’s Stmt. at 28 (citing Northern States, 78 Fed. Cl. at 465-67). On the contrary, the Court in Northern States awarded the utility PFS damages primarily after finding, based upon the facts of that case, that PFS represented the utility’s “only option” to address its alleged impending at-reactor spent fuel storage constraints and to continue operations at its facilities. 78 Fed. Cl. at 465-66 (emphasis added). This Court made different findings here, and PG&E’s vague reference to the testimony of two PG&E employees speaking favorably about the company’s involvement in PFS cannot overcome this Court’s ruling that the venture “was highly speculative and uncertain.” PG&E I, 73 Fed. Cl. at 430. In so ruling, the Court instead credited

the testimony of PG&E employees – including that of Mr. Stock, whose testimony PG&E cites in support of its argument – that PFS “had a low probability of success and faced numerous hurdles.” Id. (citing Tr. at 108:23-109:23 (Warner); 1443:7-1444:8 (Stock)). In any event, because PG&E failed to raise this issue on appeal to the Federal Circuit, PG&E waived its rights as to that issue and may not raise it on remand. Tronzo, 236 F.3d at 1349.

2. PG&E Is Barred From Recovering Its HBPP Stack Removal Costs On Remand Under The “Mandate Rule”

PG&E also reclaims on remand \$919,420 in costs for removing the HBPP ventilation stack. This Court already addressed this very issue in the first trial and rejected these costs upon foreseeability and causation grounds. In its initial decision, the Court found that PG&E decided “to remove the ventilation stack in 1998 for significant safety reasons,” as well as the “economic aspect[s]” associated with those reasons, and “to maintain Humboldt Bay in SAFSTOR status.” PG&E I, 73 Fed. Cl. at 422 (emphasis added). As such, that finding was made wholly independent of any acceptance rate applied by the Court in its decision and, therefore, falls outside the scope of this remand proceeding. Because PG&E failed to appeal the foreseeability aspect of the Court’s judgment, the Federal Circuit’s mandate bars PG&E from raising this issue on remand. Tronzo, 236 F.3d at 1349.

Even if the Court were to hold that PG&E’s HBPP stack removal claim is not barred by the mandate rule, the Court’s ruling on this issue in its original damages opinion remains sound. In its decision, this Court held that PG&E’s removal of “the ventilation stack at Humboldt Bay in 1998 while spent fuel remained in the spent fuel pool was neither the foreseeable result of the [G]overnment’s breach of the Standard Contract, nor caused by the [G]overnment’s breach of the Standard Contract.” PG&E I, 73 Fed. Cl. at 422. In so holding, the Court found that PG&E

would have incurred these costs “while spent fuel continued to be in Humboldt Bay’s spent fuel pool.” Id. (emphasis added). PG&E’s renewed attempt to establish causation on remand through the acceptance allocations in the 1987 ACR does not affect the Court’s prior conclusion on this issue.

PG&E’s request for these costs in this remand proceeding is virtually indistinguishable from its previously rejected request. In fact, in its statement of damages, PG&E repeats essentially the same argument that it made nearly three years ago: “If the spent fuel would have been removed earlier in the non-breach world, there would have been no need for PG&E to have also undergone the more complicated and costly stack take down procedure that it used in the breach world.” Pl.’s Stmt. at 18. Recognizing then that the record evidence belied PG&E’s contention, this Court found that there was overwhelming evidence to conclude that, given the existence of SNF in the HBPP spent fuel pool, “PG&E chose to remove the ventilation stack in 1998 primarily for significant safety reasons.” PG&E I, 73 Fed. Cl. at 422.

PG&E contends that it is now entitled to recover these costs because, under the 1987 ACR acceptance rates, HBPP’s SNF would have been removed in 1999. Pl.’s Stmt. at 19. PG&E then explains that, “with either a modest number of exchanges, priority acceptance for shutdown reactors or under the emergency delivery provision of the Standard Contract,” id., this SNF could have been removed in 1998 had DOE timely performed. Yet, even assuming that DOE would have accepted HBPP’s SNF in 1998 or 1999, PG&E’s argument fails to account for two very significant factors.

First, as this Court already held, and as Mr. Rueger has testified, PG&E decided to remove the HBPP ventilation stack in 1998 primarily to protect its employees and the public

safety. PG&E I, 73 Fed. Cl. at 422 (quoting Tr. at 1788:23-1789:8 (Rueger)); see also Tr. at 1784:16-1785:3 (Rueger) (explaining that the stack removal project was completed for personnel safety reasons). In its statement of damages, PG&E summarily contends that “the safety issue” would have been addressed if DOE had accepted HBPP’s SNF by 1998 or 1999. Pl.’s Stmt. at 19. However, as this Court previously found, the record evidence does not support PG&E’s contention. Instead, PG&E decided by at least 1997 to remove the ventilation stack in 1998 due to the serious seismic events in Northern California in the mid-1990s, see PG&E I, 73 Fed. Cl. at 422 (citing DX 420), and to mitigate the NRC’s concerns (which were shared by PG&E) about the potential fallout from a seismic event causing the ventilation stack to crash into a spent fuel pool with fuel in it. See PG&E I, 73 Fed. Cl. at 422 (quoting Tr. at 1788:23-1789:8 (Rueger)). Further, Mr. Rueger testified about the “economic aspect to that decision,” given that such a disaster would “contaminat[e] HBPP and, consequently,] drastically increase the costs of dismantlement” of the HBPP reactor. PG&E I, 73 Fed. Cl. at 422 (quoting Tr. at 1790:9-15 (Rueger)). Therefore, PG&E’s bald assertion fails to account for the fact that these same serious safety concerns and economic considerations, which this Court significantly credited in rejecting this damages claim after the trial, still would have existed “while spent fuel continued to be in Humboldt Bay’s spent fuel pool” in 1998 and 1999 under the 1987 ACR acceptance rates. PG&E I, 73 Fed. Cl. at 422 (emphasis added). PG&E should not be allowed to argue on remand that it would have thrown caution to the wind and simply assumed these serious safety and financial risks in 1998 and 1999.

Second, PG&E fails to account for the fact that it had to remove this ventilation stack to continue HBPP “SAFSTOR” operations. Id. As this Court explained, PG&E “could not have

continued to maintain Humboldt Bay in SAFSTOR status without either removing the stack, on the one hand, or justifying to NRC its failure to do so, on the other.” Id. (citations omitted). In fact, Mr. Rueger testified that PG&E could not continue with SAFSTOR without completing this project at that time. Tr. 1790:16-1792:11 (Rueger). Because PG&E’s SNF would have “continued to be in Humboldt Bay’s spent fuel pool” until at least 1999 under the acceptance allocations set forth in the 1987 ACR (and its GTCC likely would have remained in the pool until at least 2004), PG&E cannot now argue that it would have instead attempted to justify its failure to remove the stack to NRC and, in so doing, jeopardized its ability to maintain its HBPP spent fuel pool in SAFSTOR status. For all of these reasons, PG&E has come no closer on remand to establishing that DOE’s breach caused PG&E to incur these costs than it did at the trial. Accordingly, this Court should not revisit its factual finding that PG&E decided to undertake this project in 1998 “primarily for significant safety reasons” and that the removal of the stack “while spent fuel continued to be in Humboldt Bay’s spent fuel pool” was neither foreseeable to nor caused by DOE’s breach. PG&E I, 73 Fed. Cl. at 422 (emphasis added). In any event, because PG&E failed to raise this issue on appeal to the Federal Circuit, PG&E waived its rights as to that issue and is precluded from raising it on remand. Tronzo, 236 F.3d at 1349.

C. PG&E Is Barred From Utilizing An “Exchanges” Theory, To Attempt To Recover Its 1999 HBPP SAFSTOR Costs Both Because It Fails As A Matter Of Law And Because The Federal Circuit’s Mandate In This Case Did Not Direct The Court To Reconsider This Issue On Remand

1. Reevaluation Of This Court’s Prior Decision Regarding Exchanges Is Barred By The “Mandate Rule”

PG&E has taken the most aggressive stance possible with respect to its claimed HBPP on-site wet storage pool “SAFSTOR” costs, reasserting its previously rejected theory that includes DOE accepting HBPP’s SNF in 1998 – the very first year of performance.⁴ As the Court recognized in its original opinion, “[t]he NRC defines SAFSTOR as ‘[a] method of decommissioning in which the nuclear facility is placed and maintained in such condition that the nuclear facility can be safely stored and subsequently decontaminated to levels that permit release for restricted use.’” PG&E I, 73 Fed. Cl. at 353 (citation omitted). Because the SNF should be removed from the spent fuel pool to complete decommissioning of the nuclear reactor, SAFSTOR costs are necessarily dependent upon the removal of the SNF from the pool. Put differently, the utility should maintain SAFSTOR status (and incur these costs) as long as its SNF is located in the pool. See id.

In its “Statement of Issues” in its April 5, 2007 initial appellate brief to the Federal Circuit, PG&E identified the following issue for appeal:

⁴ In its statement of damages, PG&E claimed only that its SNF would have been removed from the HBPP spent fuel pool by 1998. Pl.’s Stmt. at 41. PG&E did not and cannot establish that its GTCC would have been removed by 1998. For this reason, PG&E’s claim for these SAFSTOR costs should fail. Yet, in response to the Government’s interrogatories and requests for admission, PG&E contends that its GTCC would have been accepted in 1998. A 14. (“A ___” refers to the appendix to this response brief.) This contention is contrary to the evidence presented at trial. As explained below, PG&E would not have removed its HBPP GTCC from the spent fuel pool prior to 2000 and did not remove it until after 2004.

Whether the CFC's exclusion of PG&E's expert testimony [Mr. Frank Graves] concerning 'exchanges' of acceptance allocations among nuclear utilities and its consequent decision that PG&E would not have used 'exchanges' was an abuse of discretion under established law.

A 18. The heading for the section of its initial brief discussing this issue was "Exclusion of Graves' Testimony Was An Abuse Of Discretion, Contributing To The Clearly Erroneous Finding That PG&E Would Not Engage In Exchanges." A 19. In its discussion of this issue, PG&E argued that this Court "excluded the most relevant evidence on these very issues – the expert testimony of Frank Graves . . .," *id.*, and that this Court's exclusion of this "highly relevant evidence was a clear abuse of discretion." A 20. PG&E then discussed the testimony that Mr. Graves would have provided regarding exchanges, and then stated that, "[a]bsent the Graves testimony, the CFC made the clearly erroneous finding that PG&E would not engage in exchanges by focusing on evidence from the breach world, where exchanges would be 'unlikely' and 'expensive.'" A 23. Although PG&E then mentioned the reasons that this Court allegedly "ignored the weight of admitted evidence" in rejecting PG&E's exchanges theory, PG&E requested that the Federal Circuit grant only the following relief:

The CFC's decision to exclude Graves' expert testimony should be reversed, and its resulting holding that PG&E would not have engaged in exchanges should be vacated. This Court should remand with instructions that the CFC admit, and duly consider, the Graves testimony in determining PG&E's damages.

A 24.

Subsequently, in its reply brief, PG&E further discussed the argument that it was raising on appeal. In the heading of its section relating to this Court's exclusion of Mr. Graves, PG&E defined the issue on appeal as follows: "Exclusion Of Graves' Testimony Was An Abuse Of

Discretion, Resulting In A Clearly Erroneous Finding That PG&E Would Not Have Engaged In Exchanges.” A 27. PG&E stated that, in its initial brief, it had “demonstrated that the CFC abused its discretion by excluding Frank Graves’ expert testimony . . .,” A 27-28, and requested the following relief: “The CFC’s arbitrary exclusion of Graves’ testimony led to its clearly erroneous conclusion that PG&E would not have engaged in exchanges in the non-breach world. Graves’ testimony should be admitted and considered in determining PG&E’s damages, as it was in Yankee.” A 30.

It is clear from its briefing before the Federal Circuit that, in its appeal to the Federal Circuit, PG&E requested that the Federal Circuit reverse this Court’s decision excluding Mr. Graves’ testimony and order this Court to reevaluate its decision rejecting PG&E’s “exchanges” argument in light of that testimony, but that PG&E did not, outside the context of its challenge to this Court’s exclusion of Mr. Graves, independently request that the Federal Circuit review this Court’s rejection of PG&E’s exchanges argument. “A party seeking to raise a claim or issue on appeal must plainly and prominently so indicate.” United States v. Jernigan, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). In its decision in this case, the Federal Circuit affirmed this Court’s exclusion of Mr. Graves, see PG&E, 536 F.3d at 1292, and it did not otherwise direct this Court to reevaluate any aspect of its exchanges decision, indicating that it did not perceive PG&E to be raising this Court’s rejection of PG&E’s exchanges argument as an independent basis of appeal outside of the exclusion of Mr. Graves’ testimony.

“An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.” Engel Indus., Inc. v. Lockformer Co., 166 F.3d 1379, 1383 (Fed. Cir. 1999). “Unless remanded by [the Federal

Circuit], all issues within the scope of the appealed judgment are deemed incorporated into the mandate and thus are precluded from further adjudication.” Id. Regardless of PG&E’s intent in raising the exchanges argument on appeal, because the Federal Circuit did not address and remand to this Court any argument about whether PG&E would have engaged in exchanges in a “non-breach” world, or whether this Court’s prior findings that PG&E would not have engaged in such exchanges in the manner that PG&E advocated should be revisited, this Court lacks jurisdiction to revisit this issue. Id. PG&E’s arguments regarding the use of an “exchanges” theory to supplement its damages claims should be summarily rejected.

2. Even If The Issue Of Whether PG&E Would Have Used Exchanges Remains Before This Court, PG&E’s Argument Should Fail As A Matter Of Law

To recover for breach of contract, a plaintiff may not claim damages that are speculative, remote, or unforeseeable. Indiana Michigan, 422 F.3d at 1373. As the Court has held, expectations based upon conjecture “are not recoverable in a common-law suit for breach of contract.” Northern Helex Co. v. United States, 524 F.2d 707, 720-21 (Ct. Cl. 1975); accord Standard Havens Prods., Inc. v. Gencor Indus., Inc., 953 F.2d 1360, 1375 (Fed. Cir. 1992). The Court also has recognized that the principles disallowing speculative awards are “especially true in suits against the United States” Northern Helex, 524 F.2d at 720; accord Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1021-23 (Fed. Cir. 1996) (quoting Northern Helex).

This Court has applied the general prohibition against speculative damages to preclude recovery by plaintiffs of exchange-based damages in SNF cases. Although the Court has recognized the likelihood that a market for the exchange of SNF allocations would have developed over time, it has never gone so far as to hold that a fully functional exchanges market

would have come to fruition in the very first year of program performance. See, e.g., PG&E I, 73 Fed. Cl. at 413; Yankee Atomic Elec. Co. v. United States, 73 Fed. Cl. 249, 303 (2006) (“Yankee Atomic I”), aff’d in part, rev’d in part, and remanded, 536 F.3d 1268 (Fed. Cir. 2008); Tennessee Valley Auth. v. United States, 69 Fed. Cl. 515, 533 (2006). To the contrary, in Yankee Atomic I, the Court rejected the plaintiffs’ contention that, in a non-breach world, they would have successfully managed to accelerate their facilities’ SNF removal dates through exchanges. Yankee Atomic I, 73 Fed. Cl. at 306. In so doing, the Court recognized that the opinion offered by plaintiffs’ expert, Frank Graves, “must be discounted to some degree to reflect the impact of the factors shown by [the Government] to retard market development.” Id. (emphasis added).

In its statement of damages, PG&E boldly contends that the Federal Circuit’s decision requires that this Court reconsider its holding that DOE would have applied an OFF pickup sequence in the “non-breach” world. Pl.’s Stmt. at 30. Specifically, PG&E argues that the Court should now on remand recognize its exchanges theory, which the Court squarely addressed and rejected at trial, and award its HBPP 1999 SAFSTOR costs in the amount of \$4.7 million as well as other damages sought on remand. Id. To attempt to assuage any notion that PG&E’s assertion is based wholly upon avarice, PG&E professes that any newfound recognition by the Court of the exchanges theory would somehow bolster the establishment of causation under the 1987 ACR acceptance rates and streamline this remand proceeding. Id. PG&E proffers three reasons for the Court to reconsider its holding regarding exchanges. Pl.’s Stmt. at 30, 32, 34. The Government will address and refute each of PG&E’s proffered reasons in turn below.

- a. The Court Reviewed All Evidence Adduced At Trial Regarding Exchanges Before Ruling That PG&E Failed To Prove By Preponderant Evidence That It Would Or Even Could Have Engaged In Exchanges, And The Federal Circuit's Mandate Does Not In Any Manner Change The Court's Ruling On Remand

PG&E first argues that this Court “failed to give effect” to the exchanges provision of the Standard Contract. Pl.’s Stmt. at 30. According to PG&E, the Court must now accord effect to this provision because it is part of the “ACS process,” and the Federal Circuit found that the “ACS process” controlled DOE’s SNF acceptance obligations. Id. at 30-31. This is patently false.

At trial, this Court recognized that PG&E claimed approximately \$44,617,000 in HBPP SAFSTOR costs incurred from the beginning of 1999 through the end of 2004. PG&E I, 73 Fed. Cl. at 412. PG&E claimed that it had incurred all of these costs because DOE failed to begin accepting the nuclear utilities’ SNF under the Standard Contract by January 31, 1998. Id. Relying upon evidence of PG&E’s approved DCSs, PG&E’s 1991 Acceptance Priority Ranking (“APR”) allocations, and the acceptance rates set forth in the 1991 ACR, the Court reasoned that DOE would not have accepted all of HBPP’s SNF “until approximately the end of 2001” had DOE timely performed. Id. Accordingly, this Court held that PG&E would have been required to “continue to maintain custodial SAFSTOR status at Humboldt Bay until approximately the end of 2001.” Id.

The Court then addressed PG&E’s argument that it would have used the approved DCSs mentioned above to engage in an exchanges market. Id. at 413. Specifically, PG&E argued that it would have used the exchange provision in the Standard Contract to trade its approved DCSs for those from other nuclear utilities. Id. PG&E further asserted that, by trading approved DCSs

and using the exchange provision of the Standard Contract, DOE would have collected all of HBPP's SNF before 2001, enabling it to advance in the acceptance queue. Id.

After considering all of the evidence adduced at trial regarding the exchange provision, the Court stated that it did "not doubt '[t]hat a market would develop around'" this provision of the contract. PG&E I, 73 Fed. Cl. at 413 (citing Tennessee Valley Auth. v. United States, 69 Fed. Cl. 515, 533 (2006)). The Court noted that "some individuals testified at trial that the utilities generally would have sought to use exchanges had DOE performed the Standard Contract." PG&E I, 73 Fed. Cl. at 413. Nonetheless, the Court found that PG&E did not prove by preponderant evidence how PG&E would have used the exchange provision of the Standard Contract, or that it would have even used it at all. Id. ("[T]he preponderance of the evidence does not establish that PG&E would have attempted to engage in exchanges, or, if it would have, whether it would have been successful or whether it would have chosen to move forward or back in the acceptance queue."). Based upon additional fact witness testimony, the Court further found that PG&E realized that exchanges could be "very expensive" and that the use of exchanges was "unlikely." Id. To further illustrate uncertainty about whether PG&E would have been able to use exchanges, the Court recognized that the terms of the Standard Contract afforded DOE a sole discretionary right, in advance, to approve or disapprove any exchange of DCSs between utilities. PG&E I, 73 Fed. Cl. at 348, 413. Having considered the parties' evidence regarding exchanges, the Court "decline[d] to engage in wholesale speculation by advancing any of PG&E's Humboldt Bay spent fuel allocations in the acceptance queue through the use of hypothetical exchanges." PG&E I, 73 Fed. Cl. at 413.

Given this Court's thorough consideration of exchanges, PG&E's argument that the Court failed to give effect to the exchange provision in the Standard Contract is inexplicable. As described above, the Court reviewed the Standard Contract's exchange provision, examined the parties' evidence regarding exchanges, and ultimately decided that PG&E did not prove that it would have or even could have engaged in exchanges. PG&E I, 73 Fed. Cl. at 348, 413. PG&E's counsel wrongly equates this Court's rejection of PG&E's exchange theory with failure to give effect to the exchange provision of the Standard Contract. See Pl.'s Stmt. at 31-32. This Court is not now required on remand to reconsider its previous rejection of PG&E's exchanges theory simply because the Court did not agree with that theory at trial. Indeed, the Court's ruling regarding PG&E's exchanges theory is not even within the scope of remand in this case.

The Federal Circuit's mandate on remand – i.e., that this Court use the acceptance allocations set forth in the 1987 ACR to calculate any damages award – does not in any manner change this Court's ruling that PG&E failed to prove by preponderant evidence how it would have used the exchange provision in the Standard Contract, or that it would have even used it at all. See generally PG&E, 536 F.3d 1282. Furthermore, PG&E's assertion that the Federal Circuit found that the "ACS process" controlled DOE's pickup obligations does not somehow implicitly negate or overrule this Court's well-reasoned decision to "decline[] to engage in wholesale speculation by advancing any of PG&E's Humboldt Bay spent fuel allocations in the acceptance queue through the use of hypothetical exchanges." PG&E I, 73 Fed. Cl. at 413. Most importantly, as previously discussed, PG&E did not appeal, and the Federal Circuit did not address or review, this Court's ruling regarding whether PG&E would have engaged in exchanges. See generally PG&E, 536 F.3d 1282. By arguing that the Court should reconsider

its ruling on PG&E's exchanges theory, PG&E invites this Court to revisit an issue that is beyond the scope of the Federal Circuit's mandate in this case. As a matter of law, the Court should decline PG&E's invitation.

- b. The Court Should Not On Remand Reconsider PG&E's Exchanges Theory Under The 1987 ACR Acceptance Rate Because PG&E's Failure To Prove By A Preponderance Of The Evidence That It Would Have Or Even Could Have Engaged In Exchanges Is Not Dependent Upon Any Particular Rate Of Acceptance

Next, PG&E contends that the Federal Circuit's decision requires the Court to reconsider "contemporary evidence" of how PG&E would have engaged in exchanges had DOE accepted SNF at the 1987 ACR rates in a "non-breach" world. Pl.'s Stmt. at 32. Specifically, PG&E argues that the issue on remand is whether and how PG&E would have used exchanges had DOE performed under the Standard Contract by accepting SNF at the rates contained in the 1987 ACR. Id. at 34. According to PG&E, the Court at trial relied upon exchanges evidence that was purportedly infected by the promotion and application of the 1991 ACR acceptance rates, which the Federal Circuit found were tainted by DOE's breach.⁵ Id. at 32-34. As with PG&E's first

⁵ PG&E's reliance upon the Federal Circuit's decision with regard to the source of the rates set forth in the 1991 ACR is improper. As part of its rationale for finding that the Court erred in ruling that the 1991 ACR presented a valid acceptance rate under the Standard Contract, the Federal Circuit held that "[t]he record . . . suggests that DOE may have put forth the 1991 acceptance rates as a litigation strategy, to minimize DOE's exposure for its impending breach." PG&E, 536 F.3d at 1291. In making its determination, the Federal Circuit cites to testimony that was not presented in this case. Rather, the cited witness testimony was presented only in Yankee Atomic. Indeed, PG&E did not even attempt to introduce or designate the witness's testimony in this case. The Federal Circuit's determination that this Court erred in not relying upon evidence not presented to it violates the basic tenet that an appellate court does not review evidence not presented to the trial court. See Coplin v. United States, 761 F.2d 688, 691 (Fed. Cir. 1985), aff'd, 479 U.S. 27 (1986); see also Sage Products v. Devon Indus., 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("[T]his court does not 'review' that which was not presented to the [trial] court."). Further, the testimony upon which the Federal Circuit relied was admitted in the Yankee Atomic

reason above, PG&E, by pleading with the Court to revisit PG&E's exchanges theory, is clearly trying at all costs to broaden the scope of the Federal Circuit's mandate in this case. The Court should not revisit PG&E's exchange theory on remand.

This Court would have correctly declined to engage in the same wholesale speculation even if the Court's decision had instead applied the 1987 ACR acceptance rates to determine HBPP's SNF allocations. The 1987 ACR acceptance rates do not now – nor could they – render PG&E's exchange theory any less speculative. That PG&E failed to prove by preponderant evidence that it would have attempted to exchange DCSs with other nuclear power utilities or, if it had, whether it would have been successful, or whether it would have chosen to move forward or back in the acceptance queue, would not somehow change with the application of the 1987 ACR acceptance rates. PG&E cannot cure on remand its failure to carry its evidentiary burden at trial with respect to its exchanges theory.

Further, the Court already found that all “contemporaneous evidence relevant to whether PG&E would have used the exchanges provision . . . indicates that PG&E found that exchanges could be ‘very expensive.’” PG&E I, 73 Fed. Cl. at 413. Presumably, PG&E produced at trial all evidence regarding whether and how it would have used exchanges. The evidence that PG&E produced – which was not dependent upon any particular acceptance rate – failed to establish that PG&E would have used exchanges. Importantly, PG&E admits that no additional

trial solely on impeachment grounds. The purpose of impeachment evidence is to diminish the credibility of the witness to be impeached, not to substantively prove a matter of consequence in the litigation – such as the supposed intent and purpose behind the 1991 ACR. See Newsome v. Penske Truck Leasing Corp., 437 F. Supp. 2d 431, 435 (D. Md. 2006). The use of this evidence by the Federal Circuit as substantive evidence was clearly improper and, therefore, should not be considered by this Court on remand.

evidence exists to show that it would have used exchanges had DOE performed under the 1987 ACR acceptance rates. See Pl.'s Stmt. at 34.

The Federal Circuit's decision does not now require the Court to reconsider on remand so-called "contemporary evidence" of how PG&E would have used exchanges had DOE performed under the Standard Contract by accepting SNF in accordance with the 1987 ACR acceptance rates. See generally PG&E, 536 F.3d 1282. As previously explained, the Federal Circuit did not address or review this Court's ruling regarding whether PG&E would have engaged in exchanges. Id. With the Federal Circuit's mandate, this Court has "the opportunity to calculate the damages owed to PG&E for DOE's partial breach of the Standard Contract" using the 1987 ACR acceptance rates. PG&E, 536 F.3d at 1292. The Federal Circuit's decision, therefore, does not in any manner require the Court to reconsider PG&E's exchanges theory. The Court should reject PG&E's improper attempt to entice this Court to revisit an issue that is plainly beyond the scope of the Federal Circuit's mandate in this case.

- c. The Court Should Not Qualify Frank Graves As An Expert In This Case On Remand Because The Federal Circuit's Mandate Does Not Require That This Court Revisit His Exclusion As An Expert Witness, And Any Hypothetical Exchanges Model That He Would Present Using The 1987 ACR Acceptance Rates Would Still Rely Upon The Same Highly Speculative Assumptions As Before

PG&E's final reason why the Court should reconsider its ruling regarding exchanges is entrenched in its second reason above. See Pl.'s Stmt. at 32-34.

PG&E begins with the premise that so-called "contemporary evidence" of how PG&E would have engaged in exchanges had DOE accepted SNF at the 1987 ACR rates in a "non-breach" world does not exist. Id. at 34. PG&E then reasons that, given the non-existence of

such “contemporary evidence,” expert testimony regarding the manner in which PG&E would use exchanges under the 1987 ACR acceptance rates is necessary. Id. Thus, PG&E urges that the Court must now reverse its pretrial decision to exclude Mr. Graves from testifying about exchanges and, in so doing, allow him to produce an exchanges model using the 1987 ACR rates of acceptance. Id. at 34-35.

Prior to trial in this case, the Court granted the Government’s motion in limine to exclude the expert testimony of Mr. Graves. PG&E I, 73 Fed. Cl. at 435. PG&E proffered Mr. Graves as an expert to provide analyses of a reasonable rate of acceptance of SNF by DOE from the nuclear power utilities and of how exchanges of SNF at certain allocations would have operated in a “non-breach” world. Id. The Court declined to qualify Mr. Graves as an expert, precluding the submission of either of his analyses. Id. The Court’s decision not to qualify Mr. Graves was based upon his lack of involvement or experience with DOE’s nuclear waste acceptance program. PG&E I, 73 Fed. Cl. at 435-36. As a corollary to the Court’s finding that Mr. Graves lacked involvement or experience with DOE’s nuclear waste acceptance program, the Court further declined to qualify Mr. Graves as an expert on the acceptance rate at which DOE would accept SNF from nuclear power utilities. Id. at 436 (disqualifying Mr. Graves as an expert witness “regarding DOE’s waste acceptance program in which he had no involvement or experience, let alone as an expert on the acceptance rate that DOE would have used had it begun to collect utilities’ spent nuclear fuel at a reasonable rate beginning in 1998.”).

In addition, the Court declined to qualify Mr. Graves as a witness with regard to his hypothetical model of how exchanges of SNF at certain allocations would have operated in a “non-breach” world. PG&E I, 73 Fed. Cl. at 436. Here, contrary to PG&E’s unfounded

assertion, the Court declined to qualify Mr. Graves as an expert for reasons wholly independent from any uncertainty about an established acceptance rate. See id. As the bases for the exclusion of Mr. Graves' hypothetical exchanges model, this Court noted that his model could not create even a reasonably accurate approximation of a hypothetical exchanges market, unless he necessarily made the following highly speculative assumptions:

(a) that DOE would have approved of every proposed exchange; (b) that all utilities would have offered their acceptance rights on the market; (c) that the lowest price that cleared the market (i.e., the price that, on a per-MTU basis, the last bidder which obtains allocations in a given year is willing to pay) is the price at which all trades are conducted in any given year; and (d) that the market for exchanges will be perfectly competitive and the market participants will have perfect information and will be driven solely by economic considerations.

Id. The Court then concluded that Mr. Graves's "highly speculative assumptions, especially without any knowledge of the likelihood that PG&E specifically would have engaged in such exchanges or even contemplated such exchanges, would not aid the court in the resolution of this case." Id. (emphasis added). For all of the foregoing reasons, the Court rejected Mr. Graves as an expert in this case.

On appeal, PG&E challenged this Court's decision to exclude Mr. Graves's expert opinions regarding rate of acceptance and hypothetical exchanges modeling. PG&E, 536 F.3d at 1292. The Federal Circuit upheld this Court's exclusion of Mr. Graves as an expert as to both of these subjects:

Mr. Graves's lack of involvement with the DOE waste acceptance program gave the Court of Federal Claims a reasonable basis for excluding his testimony. This Court does not address at all the trial court's assessment that Mr. Graves' testimony would have been speculative. . . . Examining Judge Hewitt's decision in this case, as it must under the proper standard of review, however, this

court detects no abuse of discretion in excluding Mr. Graves' testimony.

Id.

Notwithstanding the Federal Circuit's explicit finding here, PG&E inexplicably argues that the Federal Circuit's decision requires this Court to accept Mr. Graves on remand. See Pl.'s Stmt. at 34. PG&E attempts to buttress this reading of the Federal Circuit's decision by purportedly carefully parsing that Court's reasoning. Id. at 37. Specifically, PG&E urges that the Federal Circuit only cited this Court's finding that Mr. Graves lacked involvement or experience with DOE's waste acceptance program as a reasonable basis to exclude him as an expert regarding rate of acceptance. Id. PG&E then notes that the Federal Circuit "does not address at all the trial court's assessment that Mr. Graves' testimony would have been speculative" with respect to the hypothetical exchanges model. Id.; see also PG&E, 536 F.3d at 1292. Because the Federal Circuit did not address this Court's decision to exclude Mr. Graves as an expert with respect to hypothetical exchanges modeling, PG&E illogically reasons that the Federal Circuit refused to endorse the Court's exclusion of Mr. Graves. See Pl.'s Stmt. at 37-38.

To accept PG&E's reasoning, this Court must conclude that the Federal Circuit found that the Court abused its discretion by excluding Mr. Graves as an expert when – as expressly written in the opinion – the Federal Circuit detected "no abuse of discretion in excluding Mr. Graves' testimony." PG&E, 536 F.3d at 1292. The better conclusion here is that the Federal Circuit found that the Court's exclusion of Mr. Graves as an expert regarding exchanges was well within the Court's discretion. Had the Federal Circuit found that this Court had abused its discretion by excluding Mr. Graves's hypothetical exchanges model but not his testimony regarding rate of acceptance, the Federal Circuit surely would have articulated that such an abuse

had occurred as to the one opinion and not the other. Instead, the Federal Circuit concluded that this Court did not abuse its discretion by completely excluding Mr. Graves as an expert. PG&E, 536 F.3d at 1292.

Setting aside whether this Court properly exercised its discretion, the Court's decision not to qualify Mr. Graves with respect to his hypothetical exchanges model was not based upon any rate of acceptance. To the contrary, this Court disqualified Mr. Graves's exchanges model because he could not give a reasonably accurate approximation of a hypothetical exchanges market, unless he necessarily made the non-rate-based, highly speculative assumptions outlined above. PG&E I, 73 Fed. Cl. at 436. The Federal Circuit's mandate that the Court calculate PG&E's damages using the acceptance allocations set forth in the 1987 ACR does not – and would not – alter in any way the speculative nature of Mr. Graves's hypothetical exchanges model. Moreover, even if Mr. Graves were allowed to present such an exchange model on remand, he still would have to make the same highly speculative assumptions already rejected by this Court. Further, as this Court already found, Mr. Graves's model would not be based upon “any knowledge of the likelihood that PG&E specifically would have engaged in such exchanges or even contemplated such exchanges.” PG&E I, 73 Fed. Cl. at 436 (emphasis added). This Court already found that these highly speculative assumptions, created by a purported expert without sufficient knowledge or experience, would not have aided the resolution of this case. Id. Likewise, Mr. Graves's same highly speculative assumptions would not aid the Court in the resolution of this case on remand, even with the application of the 1987 ACR acceptance rates. Accordingly, the Court should decline to allow Mr. Graves to submit another highly speculative, hypothetical exchanges model in this remand proceeding.

PG&E should not be able on remand to reassert an already rejected exchanges theory to increase its claim for HBPP SAFSTOR costs by \$4.7 million or to remedy SNF storage restrictions at DCP. The Court should follow the Federal Circuit's mandate on remand to calculate PG&E's damages for SAFSTOR costs based upon the OFF sequence using the 1987 ACR acceptance rates.

D. PG&E Is Precluded From Seeking To Establish Causation For Its 1999 HBPP SAFSTOR Costs Based Upon The Application Of The "Priority For Shutdown Reactors," "+/- 20 Percent," Or "Emergency Delivery" Provisions Of The Standard Contract

PG&E asserts that it is entitled to the additional \$4.7 million in HBPP SAFSTOR costs and can overcome any DCP SNF storage restrictions based upon certain newly raised causation theories. See Pl.'s Stmt. at 19, 41-42. Specifically, PG&E contends that the application of the "priority for shutdown reactors" and/or "emergency deliveries" provisions of the Standard Contract provide yet another basis upon which to award it the additional HBPP SAFSTOR costs. Id. at 19. While PG&E referenced the priority for shutdown reactors provision in its prior post-trial briefing, it never explicitly relied upon this provision to establish causation in this case, prior to the Court's October 13, 2006 entry of judgment in this case. Pl.'s Post-Tr. Br. at 16 (filed June 30, 2006). Further, the Court, in its original damages opinion, described this provision, but did not factor its application in its determination of causation. See PG&E I, 73 Fed. Cl. at 350. On appeal, PG&E did not challenge the Court's failure to apply this priority provision in determining causation. Accordingly, pursuant to the mandate rule, PG&E is precluded from relying upon this provision for the first time on remand to support its claim for HBPP SAFSTOR costs or any other damages claim. Tronzo, 236 F.3d at 1348-49.

With regard to the storage restrictions that PG&E faced at DCP, PG&E raises for the first time in its statement of damages in this remand proceeding the possible application of the “emergency deliveries” or “+/- 20 percent” provisions of the Standard Contract. Pl.’s Stmt. at 40-41. At trial, PG&E did not rely upon either of these provisions to establish causation. See generally Pl.’s Post-Tr. Br. (filed June 30, 2006). Because PG&E failed to raise these theories during the initial action in this case or on appeal to the Federal Circuit, PG&E is barred from raising them now for the first time on remand. Tronzo, 236 F.3d at 1348-49. Accordingly, the Court should not even entertain these newly raised theories in this remand proceeding.

II. THE COURT SHOULD ENTER JUDGMENT UPON THE EXISTING RECORD IN THIS REMAND PROCEEDING AS TO ALL REMAINING DAMAGES CLAIMS RAISED BY PG&E ON REMAND

A. The Court Is Entitled To Decide This Remand Case Upon The Existing Record

The law is clear that this Court has discretion to consider only the existing trial record in deciding any damages claims and issues that are properly before the Court upon remand. “[T]he general rule [is] that, following appellate disposition, a district court is free to take any action that is consistent with the appellate mandate, as informed by both the formal judgment issued by the court and the court’s written opinion.” Exxon Chemical Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1484 (Fed. Cir. 1998), cert. denied, 525 U.S. 877 (1998). “Reopening the evidentiary record on remand is in the sound discretion of the trial court” Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, 101 F. App’x 818, 822-23 (Fed. Cir. 2004) (citing Enzo Biochem, Inc. v. Calgene, Inc., 188 F.3d 1362, 1379-80 (Fed. Cir. 1999), and Zenith Radio Corp. v. Hazeltin Research, Inc., 401 U.S. 321 (1971)). The factors that the Court should consider in deciding whether to reopen the record upon remand include “the probative

value of the evidence proffered, the proponent's explanation for failing to offer such evidence earlier and the likelihood of undue prejudice to the proponent's adversary." Confederated Tribes, 101 F. App'x at 823 (citing Blinzler v. Marriott Intern., Inc., 81 F.3d 1148, 1160 (1st Cir. 1996)). The Federal Circuit has on several occasions upheld this Court's refusal to reopen the record upon remand. See Confederated Tribes, 101 F. App'x at 823; see also Florida Power & Light Co. v. United States, 103 F. App'x 669, 673 (Fed. Cir. 2004); Adelson v. United States, 782 F.2d 1010, 1012 (Fed. Cir. 1986). But see Massachusetts Bay Transportation Authority v. United States, 167 F. App'x 182, 187 (Fed. Cir. 2006) (upholding court's decision to allow further expert testimony). In Confederated Tribes, the Federal Circuit rejected a challenge to this Court's decision not to reopen the record. As the Federal Circuit explained, the Court was within its discretion to exclude the introduction of additional evidence because the proffered evidence was available at the time of the original trial, the party proffering the evidence failed to object to the evidence at trial, and that the evidence offered was non-probative. 101 F. App'x at 823. This Court has similar bases upon which to reject the presentation of further evidence in this remand case.

As explained above and discussed in greater detail below, the mandates in PG&E and Yankee Atomic direct the Court to award damages based upon the acceptance rates set forth in the 1987 ACR and the SNF and HLW acceptance allocations that PG&E would have received pursuant to those rates. Yet, the Federal Circuit's mandates are silent as to whether the Court should – or should not – reopen the existing record to accept new evidence on remand. Instead, the Federal Circuit in this case merely stated that the Court has “the opportunity to calculate the damages owed to PG&E” based upon the 1987 ACR rates and “to account for GTCC waste

disposal” upon remand. PG&E, 536 F.3d at 1292-93. Nevertheless, based upon the legal principles set forth above, the Court has discretion to decide the damages claims and issues properly before the Court upon remand based upon the existing evidentiary record and still follow the letter and intent of the Federal Circuit’s mandate.

In its statement of damages, PG&E offers few clues as to any additional evidence that it may seek to present in this remand proceeding, beyond requesting that the Court allow Mr. Graves to present a new expert opinion and damages analysis. PG&E suggests that such testimony may be required to establish “objective facts . . . that post-date the 2006 trial” and that the Court may consider the application of the +/- 20 percent or the emergency deliveries provisions of the Standard Contract, even though PG&E never raised such arguments prior to entry of the Court’s October 13, 2006 judgment. Pl. Stmt. at 22-23. However, testimony regarding matters that post-dated the 2006 trial would not be appropriate because such matters took place after the claim period in this case and the time period in which PG&E made decisions that are the subject of its damages claims. As discussed above, testimony regarding provisions of the Standard Contract that PG&E never raised or relied upon to establish causation are precluded pursuant to the mandate rule.

Upon receiving PG&E’s statement of damages, the Government asked PG&E in interrogatories to identify any additional analyses that underlie their damages claims on remand. In response, PG&E stated that no such additional analyses exist. A 13. The evidence adduced at trial includes all of the contemporaneous documentation relating to DCP’s storage constraints. As explained further below, these facts and this analysis would not change with a different acceptance rate. In fact, in response to our interrogatories, PG&E identified three fact witnesses

(Messrs. Womack, Kapus, and Strickland) as knowledgeable about the factual circumstances of this damages claim. A 12. Tellingly, these witnesses already testified at trial. See PG&E I, 73 Fed. Cl. at 339-41. Given that there are no additional analyses on the matter, it is clear that PG&E would offer these same witnesses to testify in hindsight as to what PG&E “would have done” had DOE performed using the acceptance allocations in the 1987 ACR rate. As explained further below, all of the contemporaneous documentation is already in the record, and testimony offered in hindsight regarding what PG&E “would have done” is not probative.

With regard to the presentation of additional evidence regarding GTCC, the Government has consistently challenged PG&E’s position that its GTCC would be accepted with its SNF and sought to hold PG&E to its burden to establish the non-breach world with regard to the costs that it would incur to store GTCC waste. See Def.’s Post-Tr. Br. at 26-27 (filed June 30, 2006); Def.’s Post-Tr. Resp. Br. at 16-17 (filed July 7, 2006). Again, the Government recently asked PG&E in interrogatories to set forth the schedule upon which DOE would have accepted its GTCC. In response, PG&E simply stated that DOE would have taken its GTCC along with its SNF in 1998. A 14. In both its statement of damages and interrogatories response, PG&E has failed to establish the schedule upon which the Government would have accepted its GTCC within the claim period. Given the Government’s consistent posture regarding this issue, the Court should not allow PG&E to present new evidence to meet this burden.

This Court can adhere to the Federal Circuit’s mandate – that is, that this Court use the 1987 ACR acceptance rates to calculate PG&E’s damages – and resolve this case on remand based solely upon the existing record. See, e.g., Florida Power, 56 Fed. Cl. at 560 (“The record developed at the 2001 trial is amenable to rendering findings on the subject of the remand.”). In

short, the Court need not – and should not – consider any new or additional evidence to calculate PG&E’s damages using the 1987 ACR acceptance rates as well as the SNF and HLW acceptance allocations that PG&E would have received pursuant to those rates. The record developed at the 2006 trial in this case is amenable to rendering findings on the matters before this Court on remand and subject to the Federal Circuit’s mandate. Of particular importance here, PG&E admits that it does not have – and, therefore, could not produce – any new or additional evidence, in the form of analyses or otherwise, upon which this Court could make findings of fact regarding the calculation of PG&E’s damages, if any, pursuant to the 1987 ACR acceptance rates. See, e.g., A 13. Therefore, the Court may properly limit this remand proceeding to the existing record in this case.

B. The Federal Circuit’s Mandate Requires The Court To Apply The 1987 ACR Rate To Determine Any Damages Owed Because Of DOE’s Failure To Accept Specific Quantities of SNF And/Or HLW Within The Claim Period

In Yankee Atomic, the Federal Circuit made clear that plaintiffs “can only sustain their damages claim” if they establish causation, foreseeability, and reasonableness through the mechanism of creating a plausible non-breach world. 536 F.3d at 1273 (citation omitted). As such, requiring plaintiffs to depict an accurate non-breach world is crucial to the Court’s ability to evaluate whether certain items claimed as damages are costs that would have been incurred even if DOE had begun accepting SNF and HLW in 1998 or, instead, are costs that were incurred for reasons not attributable to DOE’s delay. Yankee Atomic, 536 F.3d at 1273. “The burden rests on the non-breaching party to present evidence about its condition assuming full government performance, in order to allow the court to compare the breach and non-breach worlds and accurately assess damages.” Dominion Resources, Inc. v. United States, 84 Fed. Cl.

259, 270 (2008), appeal pending, Nos. 2009-5031, -5032 (Fed. Cir. docketed Dec. 30, 2008) (citing Yankee Atomic, 536 F.3d at 1273). We recognize that, in its initial decision, this Court properly applied these principles in making its determination of PG&E's damages award based upon the application of the 1991 ACR acceptance rates. See PG&E I, 73 Fed. Cl. at 395. We request that the Court hold PG&E to the same burden in assessing PG&E's damages award based upon the application of the 1987 ACR rates.

In PG&E, the Federal Circuit held that DOE was required to begin accepting SNF and HLW from Standard Contract holders by January 31, 1998, based upon the rates of acceptance contained in the 1987 ACR.⁶ 536 F.3d at 1292. In addition, the Federal Circuit held in Yankee Atomic that GTCC constituted HLW, which was covered by the Standard Contract and, consequently, should be accepted by DOE on the same schedule as SNF.⁷ 536 F.3d at 1274. In

⁶ Contrary to PG&E's assertion that the rate of acceptance to be applied in 2008 and thereafter is 3,000 MTU, see Pl.'s Stmt. at 7, the document that the Federal Circuit directed this Court to use to analyze causation – the 1987 ACR – does not contain rates after the first 10 years of performance. PX 96 at 7. Moreover, neither the Federal Circuit nor this Court has made the legal determination that the rate of acceptance to be applied beginning in 2008 is 3,000 MTU.

⁷ GTCC is not fuel, but other metal components in the nuclear reactor that have been exposed to radiation during the reactor's operation. See generally PG&E I, 73 Fed. Cl. at 352. As this Court has explained, GTCC is typically generated for disposal after a nuclear reactor has ceased operations. See id. (citations omitted). In this case, PG&E's GTCC consists of metal components of its HBPP nuclear reactor, which PG&E was required to dismantle and segment before the reactor could be decommissioned. See generally Tr. 1389:5-1390:23 (Womack). The record adduced at trial shows that, at least through 2004, HBPP's GTCC was contained in the spent fuel pool. See PG&E I, 73 Fed. Cl. at 421. Both PG&E and the office within DOE charged with administering the Standard Contract understood GTCC to constitute low-level radioactive waste that would not be accepted pursuant to the Standard Contract. See id. at 404 ("As late as December of 1997, PG&E recognized that GTCC waste is not HLW, and that DOE's disposal plans for GTCC waste were uncertain.") (citing DX 445). Nevertheless, the Federal Circuit in Yankee Atomic affirmed the trial court's ruling in that case that GTCC constitutes HLW as that term is defined in the Standard Contract, 536 F.3d at 1278, and the

so holding, the Federal Circuit concluded that “the Government planned to (and would have) removed the GTCC with the SNF.” *Id.* at 1278 (emphasis added). As such, the Federal Circuit directed this Court to account for the acceptance of GTCC on remand. *PG&E*, 536 F.3d at 1293. Accordingly, to prove its damages, PG&E must demonstrate that DOE had a specific obligation to accept a specific quantity of SNF and HLW (in the form of GTCC) from PG&E during the period encompassed in its claims, and that PG&E has suffered injuries as a result of DOE’s failure to accept that amount of SNF and HLW. PG&E has the burden on remand to set forth a non-breach scenario to establish that the damages it seeks were caused by DOE’s delay in accepting SNF and HLW (in the form of GTCC). *See Yankee Atomic*, 536 F.3d at 1268, 1272-77.

Yet, because the 1987 ACR does not include HLW, the Federal Circuit’s holding with respect to GTCC raises an important issue on remand, particularly since the *Yankee Atomic* Court made clear that the utilities must introduce evidence establishing their “condition with full Government performance.” *Id.* at 1273. In particular, given the Federal Circuit’s holding that DOE is required to accept GTCC, PG&E, to meet its burden to show its condition had DOE not breached the Standard Contract and, specifically, to establish the non-breach world, must establish when DOE would have accepted GTCC from PG&E’s HBPP as well as from the other nuclear power utilities, how much GTCC DOE would have accepted, and how the acceptance of GTCC would have affected the amount of SNF accepted at the 1987 ACR rates. As the Federal Circuit made clear in *Yankee Atomic*, PG&E’s presentation of damages must be based upon a “contractually-defined hypothetical world.” 536 F.3d at 1274. Because the acceptance queue

Federal Circuit ordered the Court in this case to apply that decision. *PG&E*, 536 F.3d at 1293.

established pursuant to the Standard Contract was to be based upon the date of discharge for all SNF and HLW, the Court must hold PG&E to its burden of establishing a queue that includes GTCC as HLW. In short, if DOE is obligated to accept GTCC under the Standard Contract, PG&E has the burden to explain and reconcile DOE's obligation to accept SNF (as defined in the applicable ACR), together with DOE's concurrent obligation to accept GTCC.

C. PG&E Cannot Recover Its Costs To Store HBPP's GTCC Unless It Can Establish That DOE Was Obligated To Accept Such GTCC Within The Claim Period

1. PG&E Cannot Demonstrate That DOE Would Have Accepted Its GTCC Within The Existing Claim Period

Because these “intricate case[s] demand[] more than estimates or assumptions as proof of causation,” Yankee Atomic, 536 F.3d at 1273, a showing of causation “depend[s] on some comparison of the contractually-defined hypothetical world to the expenses actually incurred.” Id. at 1274. As noted above, PG&E has, to date, failed to produce a damages analysis that would fully depict “the contractually-defined hypothetical world” necessary to allow this Court “to perform the necessary comparison between the breach and non-breach worlds and thus . . . accurately assess [PG&E's] damages.” Id. at 1273 (citations omitted). As such, PG&E has failed to follow the explicit direction of the Federal Circuit in Yankee Atomic. PG&E's simple recitation of the acceptance allocations in the 1987 ACR plainly does not paint a complete picture of DOE performance. See Pl.'s Stmt. at 6-12.⁸ Rather, PG&E must show how DOE's

⁸ In its statement of damages, PG&E relies upon the allocations set forth in the 1987 ACR for years 9 and 10 at DCP, but then also references the 2004 ACR/APR. Pl.'s Stmt. at 21. The Federal Circuit has directed this Court on remand to recalculate PG&E's damages based upon the acceptance allocations in the 1987 ACR. Yet, in doing so, it is not clear that this Court may properly rely upon the 2004 ACR/APR, a document that post-dates both the January 31, 1998 date and the majority of PG&E's claim period. Neither this Court nor the Federal

failure to accept those amounts of SNF and HLW allocated in the 1987 ACR caused PG&E to incur the damages it seeks.

Pursuant to the Standard Contract, DOE is to accept SNF and HLW “based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor.” PG&E I, 73 Fed. Cl. at 349 (citing PX 54, Art. VI.B.1.(a)). This ranking, based upon discharge date, is commonly referred to as the “oldest fuel first” or “OFF” queue. In implementing the contract, DOE was to issue documents known as annual capacity reports, which set forth the “annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW . . . ,” id., Art. IV.B.5.(b), and annual priority rankings, which set forth the place for all SNF and HLW in the queue based upon its age under the OFF allocation method. Given the Federal Circuit’s determination that GTCC was converted into HLW under the Standard Contract through the NRC’s rule-making in 1989, PG&E must establish how the 1989 addition of GTCC into the waste acceptance schedule affects the allocation of SNF and HLW acceptance slots under the acceptance rate that DOE included in the 1987 ACR.

At trial, PG&E explained that one of the six planned dry storage containers at HBPP would contain GTCC. PG&E I, 73 Fed. Cl. at 421. Further, at trial, PG&E indicated that it would not have procured or loaded its GTCC waste container, nor incurred costs relating thereto, “until after 2004.” Id. (quoting Pl.’s Memo. at 57) (emphasis added). Accordingly, if DOE would not have accepted PG&E’s canister of GTCC by 2004, PG&E would have stored its

Circuit has reached the issue of what DOE’s obligations were after the first 10 years of the program, and that issue is not before this Court on remand. Nevertheless, because PG&E’s damages claim ends in 2004, it is unnecessary for the Court to resolve that issue here.

GTCC on-site – most likely in the HBPP spent fuel pool – from 1999 through 2004, even if DOE had timely performed.

While acknowledging that the Federal Circuit in Yankee Atomic held that DOE is required under the Standard Contract to accept GTCC (now considered to be HLW) with SNF, see Pl.’s Stmt. at 15-16, PG&E summarily contends, without explanation or support, that DOE would have accepted GTCC outside of the waste acceptance schedule in the 1987 ACR. Id. at 16-17. Specifically, PG&E states that DOE simply would have accepted the GTCC generated “at the small number of shutdown reactors having such waste . . . merely [as] an ‘add-on’ to th[e] established pickup schedule.” Id. at 17. As elaborated by counsel for PG&E during the January 15, 2009 status conference, see Tr. at 19:1-5, “[DOE would] just pick up the very small quantity of GTCC and throw it on the same train. It’s a very simple response. . . . [I]t’s not that complicated.” This simple assumption – “[just] throw it on the same train” – is precisely the type of “estimate or assumption” that the Federal Circuit rejected in Yankee Atomic. 536 F.3d at 1273 (explaining that these “intricate case[s] demand[] more than estimates or assumptions as proof of causation”). In response to the Government’s interrogatories and requests for admission, PG&E contends that DOE would have accepted HBPP’s GTCC in 1998. A 46. This assertion cannot be correct. Pursuant to PG&E’s allocations in the 1987 ACR had DOE timely performed, HBPP’s last SNF would not be removed from the pool until 1999. Accordingly, PG&E could not have had its GTCC accepted in 1998 because it would not yet have had any GTCC, given that it would not yet have dismantled its reactor. To the extent that this theory

represents the basis for PG&E's damages claim for SAFSTOR costs, the Court should find in the Government's favor.

PG&E's suggestion that its HBPP GTCC would have been available for pick-up with its SNF is belied by the evidence. See generally Pl.'s Stmt. at 13-16. For instance, Mr. Womack already testified at trial that PG&E maintained HBPP's spent fuel pool in "SAFSTOR" to dismantle the plant. PG&E, 73 Fed. Cl. at 353 (citing Tr. at 1002:23-1003:2 (Womack)). Mr. Womack further testified that HBPP will generate significant additional GTCC during decommissioning, see Tr. 1109:11-18 (Womack), and that it did not intend to generate or segment its GTCC until after its SNF was removed from the spent fuel pool See Tr. 1389:5-1390:23 (Womack); see also DX 445 (HBPP intended to segment its reactor core only after all SNF was removed from the spent fuel pool). As noted above, pursuant to the acceptance allocations set forth in the 1987 ACR, HBPP's SNF would have been removed from the spent fuel pool in 1999. See PX 96 at 7. As a result, HBPP's GTCC would not have been segmented until at least 2000. Based upon this 2000 "discharge date," PG&E would have been required to store its GTCC on-site until DOE accepted SNF and HLW that had been discharged in that year, causing PG&E to incur significant costs for that storage – either in the spent fuel pool or in dry storage. Even more, this Court already found, and PG&E already acknowledged, that HBPP's GTCC would not even have been loaded into its canister until after 2004. PG&E I, 73 Fed. Cl. at 421. Accordingly, PG&E cannot establish that HBPP's GTCC would have been accepted by DOE prior to 2004 and within this claim period.

Further, PG&E must account for the acceptance of SNF and HLW in the form of GTCC or otherwise explain the effect of GTCC's inclusion upon the acceptance queue in the 1987

ACR. To apply the rates contained in the 1987 ACR completely, PG&E must consider an acceptance queue that contains both SNF and HLW under an OFF schedule, as required by the terms of the Standard Contract. That is, to develop a proper acceptance queue under the 1987 ACR rates, PG&E must identify the GTCC within the industry, identify the age of each GTCC, and identify the place within the acceptance queue that each piece of GTCC would be assigned in light of its age. See Yankee Atomic, 536 F.3d at 1274 (recognizing the trial court's "obligation to determine the SNF and HLW acceptance rate under the Standard Contract and apply that rate in determining the substantial cause of the [plaintiff's] costs.") (emphasis added). Once that queue is identified, the 1987 ACR acceptance rates can be applied to identify the years in which utilities would receive SNF/HLW acceptance allocations.

PG&E's heavy reliance upon the fact that the Federal Circuit's opinion in Yankee Atomic did not explicitly state that GTCC should be included into the acceptance allocations contained in the 1987 ACR is misplaced. See Pl.'s Stmt. at 17. As a threshold matter, PG&E's contention fails to account for the inherent tension between the Federal Circuit's decisions in PG&E and Yankee Atomic concerning DOE's obligation under the Standard Contract to accept GTCC in the non-breach world. Indeed, the Court has recognized "this inconsistency" in the Federal Circuit's pronouncements in these cases:

According to the Federal Circuit, the Standard Contract required DOE to accept SNF/HLW in accordance with the 1987 ACR process, however, HLW is not included in the 1987 ACR acceptance schedule. Pacific Gas and Electric Co. v. United States, 536 F.3d 1282, 1292 (Fed. Cir. 2008). . . . [Yet,] [t]he Federal Circuit also held that the Government would have removed GTCC (which is HLW) with SNF. Yankee Atomic Elec. Co., 536 F.3d at 1278-79.

Energy Northwest v. United States, No. 04-10C, Order, at 2 (Jan. 13, 2009) (Damich, C.J.)

Thus, contrary to PG&E's contention, see Pl.'s Stmt. at 17, there is nothing "half-hearted" about the Government's reading of the Federal Circuit's decisions in PG&E and Yankee Atomic together with the 1987 ACR document. As then-Chief Judge Damich recognized, the 1987 ACR explicitly excludes HLW from the waste acceptance schedule in that document. See PX 96 at 7 n.3 ("The waste acceptance schedule for HLW is not included since the Mission Plan Amendment does not specify acceptance of HLW during the 10-year period covered by this report."). Even more, the 1987 ACR document clearly states that, to the extent that HLW or other materials are eventually added to the acceptance queue, the priority listings in that document would be adjusted in subsequent ACRs. Id. at 10. Finally, PG&E's contention that neither the 1987 ACR nor the Mission Plan Amendment could possibly have referred to GTCC as HLW is of no moment. Pl.'s Stmt. at 17-18. As explained above, the Federal Circuit has since held that the NRC, in 1989, converted GTCC into HLW as that term is defined in the Standard Contract, and that the Standard Contract requires DOE to accept SNF and HLW (in the form of GTCC) in accordance with the 1987 ACR process. Yankee Atomic, 536 F.3d at 1278. Given that the NRC's rule converting GTCC into HLW was not issued until two years after the 1987 ACR was issued, it would have been impossible for the 1987 ACR to have actually incorporated GTCC into the queue when the 1987 ACR was issued. In light of the Federal Circuit's decision, PG&E must now account for the effect of GTCC's inclusion upon the acceptance queue or admit that the acceptance of GTCC as HLW would not have begun in the first 10 years of the DOE program, leaving PG&E to store its GTCC for an extended period of time.

PG&E also wrongly disparages the Government's position here as "new-fangled." Pl.'s Stmt. at 16. As counsel for defendant explained during the January 15, 2009 status conference, see Tr. 19:11-20:22, the Government has consistently argued in these SNF cases that DOE was not required under the Standard Contract to accept GTCC along with SNF. As PG&E is well aware, the Federal Circuit rejected the Government's position in Yankee Atomic. Accordingly, this "new" issue – how to account for DOE's acceptance of HLW in the form of GTCC, and its effect upon the acceptance queue – has arisen precisely because of the Federal Circuit's ruling in Yankee Atomic. The Government's position, therefore, represents a clear response to, and is fully consistent with, the Federal Circuit's decision in Yankee Atomic and that Court's mandate in this case.

In any event, the issue of PG&E's failure to establish causation with regard to the schedule upon which DOE would have accepted GTCC is not "new" to this case. In fact, in its post-trial briefing, the Government argued that, because PG&E would have been required to store its HBPP GTCC in the spent fuel pool beyond the date of removal of its SNF, PG&E had failed to prove causation for any HBPP SAFSTOR costs. See Def.'s Post-Tr. Br. at 24 (filed June 30, 2006); Def.'s Post-Tr. Rep. Br. at 17 (filed July 7, 2006). In its initial decision, the Court declined to "speculate as to the amount of damages that should be reduced from plaintiff's Humboldt Bay SAFSTOR damages claim due to the lack of any obligation on the part of the government to collect GTCC Waste from Humboldt Bay." PG&E I, 73 Fed. Cl. at 416. Now, the Federal Circuit has determined that GTCC constitutes HLW and that "the Standard Contract required DOE to accept SNF/HLW in accordance with the 1987 ACR process." PG&E, 536 F.3d at 1292-93. Accordingly, the Court should hold PG&E to its burden to establish the

schedule upon which DOE would have accepted HBPP's GTCC and the damages, if any, that resulted from DOE's failure to accept its GTCC within the claim period. Notwithstanding PG&E's dissembling effort, the Federal Circuit's decisions in PG&E and Yankee Atomic both make clear that the Standard Contract requires DOE to accept SNF and HLW (in the form of GTCC) in accordance with the 1987 ACR process. PG&E, 536 F.3d at 1292; Yankee Atomic, 536 F.3d at 1274. To interpret the Federal Circuit's holding in Yankee Atomic as permitting SNF plaintiffs to circumvent the contractual requirements of the ACR process for the acceptance of GTCC would directly conflict with the rationale underlying that decision, as well as the OFF scheduling mechanism in the Standard Contract. As such, PG&E must incorporate GTCC into a damages model or otherwise explain the effect of the inclusion of GTCC upon the queue. Were the Court to allow PG&E to recover for its GTCC costs without requiring it to demonstrate when its GTCC (and the GTCC of the nation's nuclear power utilities as a whole) would have been accepted, it would ignore the "oldest waste first" provision of the Standard Contract, in violation of well-established contract interpretation principles. See Yankee Atomic, 536 F.3d at 1274 (criticizing the trial court for simply accepting plaintiffs' theory regarding exchanges).

Accordingly, PG&E cannot recover the costs associated with the storage of its HBPP GTCC unless it establishes how DOE's failure to accept the HLW (in the form of GTCC) allocated in accordance with the 1987 ACR acceptance rates caused PG&E to incur these costs. Id. at 1273 ("Without an express timetable for removal of the Yankees' waste in the event the Government had kept its bargain, the Yankees cannot show the expenses that they might have avoided.").

2. PG&E Cannot Recover Its HBPP ISFSI Costs Related to GTCC Storage Based Upon The Existing Record In This Remand Proceeding

PG&E seeks on remand HBPP ISFSI damages through 2004 of \$9,534,000. Included in this amount is the one-sixth of the HBPP ISFSI costs that this Court deducted after trial on the grounds that one of six planned dry storage containers would store GTCC. Pl.'s Stmt. at 14. In its initial decision, the Court concluded that this amount equated to \$1,599,841, or one-sixth of PG&E's HBPP ISFSI damages award of \$9,599,046 (which accounts for the Court's deduction of the costs of the Taiwan earthquake investigation (\$175,954)), yielding \$7,999,205. PG&E I, 73 Fed. Cl. at 421 n.73.

PG&E contends that it is now entitled to the one-sixth deduction of the HBPP ISFSI costs (or \$1,599,841) simply because the Federal Circuit in Yankee Atomic reversed this Court's conclusion that DOE was not obligated to accept GTCC along with SNF under the Standard Contract. Pl.'s Stmt. at 14-18. PG&E's simplistic assertion fails to account for the record evidence in this case.

PG&E's claim for these costs is premised upon its contention that, under the 1987 ACR acceptance rates, DOE would have accepted its HBPP SNF by 1999. See id. at 13-16. However, as explained above, PG&E must establish when DOE would have accepted its GTCC in the queue. Since HBPP could not have segmented its GTCC until at least 2000, DOE would not have accepted HBPP's GTCC until well beyond the time that it would have accepted HBPP's SNF in 1999. As a result, HBPP would have been required to store its GTCC on-site through 2004 and many years thereafter in the non-breach world. Thus, contrary to PG&E's assertion, see Pl.'s Stmt. at 15, DOE's partial breach of the Standard Contract could not have caused PG&E to incur HBPP ISFSI costs relating to GTCC. Consequently, PG&E cannot establish

causation on remand for any HBPP ISFSI costs relating to GTCC. Accordingly, the Court should not award PG&E on remand the one-sixth deduction of these costs from its initial decision.

3. PG&E Cannot Recover Its HBPP SAFSTOR Costs For 2000 Through 2004 Based Upon The Existing Record In This Remand Proceeding

PG&E's claim also includes HBPP SAFSTOR costs for 2000 through 2004, totaling \$38,678,000. Pl.'s Stmt. at 13. However, as explained above, HBPP's GTCC would not have been loaded to the ISFSI until after 2004, causing PG&E to incur GTCC storage costs in the spent fuel pool through at least 2004. See PG&E I, 73 Fed. Cl. at 353 (citing Tr. at 715:12-20 (Stuart) (HBPP's GTCC was stored in the spent fuel pool)). To the extent that HBPP's GTCC would have been stored in the spent fuel pool through 2004 (where it apparently sat until at least 2004), PG&E cannot prove causation for any SAFSTOR costs. The record evidence also demonstrates that PG&E planned to segment its HBPP reactor in the spent fuel pool, see DX 445 at 55-56, and that PG&E will generate significant additional GTCC at HBPP during decommissioning. See Tr. at 1109:11-18 (Womack). To the extent that PG&E would have stored and/or segmented its HBPP GTCC within the spent fuel pool, PG&E would have had to continue to maintain custodial SAFSTOR status at HBPP until at least 2004. PG&E cannot establish causation for SAFSTOR costs on remand.

D. PG&E Cannot Recover Any Of Its DCPD Damages Claims On Remand Without First Establishing Causation Pursuant To The 1987 ACR Process As Required By The Federal Circuit's Decision In This Case

1. PG&E Has Not Yet Established The Necessary Showing Of Causation For Its DCPD ISFSI And Temporary Rack Costs

PG&E also must establish that DOE's failure to accept the amounts of SNF set forth in the 1987 ACR caused it to build the DCPD ISFSI and incur the costs of the temporary racks for the DCPD spent fuel pools. As PG&E noted in its 1993 study of storage needs, "on-site spent fuel storage requirements for [DCPD] are governed by spent fuel discharges, the maximum capacity of the spent fuel pools, and the starting date and rate of acceptance of spent fuel by DOE." PX 185 (PDCP0008236). In its statement of damages, PG&E correctly identifies the allocations set forth in the 1987 ACR for the acceptance of its SNF in years 9 and 10 of the program. Pl.'s Stmt. at 21. PG&E then simply asserts, without any citation to the record or other support, that "DOE's removal of a significant quantity of spent fuel beginning in [2006], and continuing at regular intervals in subsequent years, would have prevented the Diablo Canyon pools from ever reaching capacity." *Id.* at 22. Yet, PG&E acknowledged the following in its post-trial brief:

[H]ad DOE performed as required and picked up PG&E's spent fuel by 1998 – or any time before 2006 – the storage capacity in the spent fuel pools would have been sufficient to allow the continued operation of the reactors without the need for the study of storage alternatives or for dry storage or the temporary cask pit racks.

Pl.'s Post-Tr. Br. at 38 (filed June 30, 2006) (emphasis added). Given that DOE would not have accepted SNF from DCPD until sometime in 2006 at the earliest, PG&E will not be able to easily

establish that it would have avoided the need for some additional storage at DCPD prior to DOE's first pick-up of SNF.

Tellingly, PG&E appears to acknowledge that it may not be able to establish causation based upon the existing record. PG&E notes in its statement of damages that it may need to introduce additional documents or provide "a modest amount of testimony" to establish "objective facts" that post-date the 2006 trial. Pl.'s Stmt. at 22 n.6. The Government sought to obtain the specific support for PG&E's claims by serving upon PG&E requests for production of documents and interrogatories immediately after we received PG&E's filing. In its written response to our production requests, PG&E stated that it would produce "a few additional documents" in response to our request for production of all analyses that support its statement of damages. Then, in its response to our interrogatories, PG&E stated that no such analyses supporting its damages claims exist. A 5 and 13.

Without additional support, PG&E cannot carry its burden. As this Court noted in its initial decision, the DCPD spent fuel pools were projected to reach capacity in 2006. PG&E I, 73 Fed. Cl. at 423. According to PG&E's 1993 analysis, upon which the Court relied, PG&E would have lost full core reserve at DCPD Unit 1 in March 2006 and at Unit 2 in September 2006. PX 228 at 2. The Court also found that PG&E wanted to ensure that alternative storage options were available by 2004. PG&E I, 73 Fed. Cl. at 424 (citing PX 228 at 14). Moreover, as PG&E recognizes, see Pl.'s Stmt. at 17, the acceptance allocations set forth in the 1987 ACR do not account for the acceptance of GTCC in the queue. Once GTCC is included in the queue, as required by the Federal Circuit's decision in Yankee Atomic, PG&E's allocations may have been pushed to the following year, leaving PG&E with a need for additional storage prior to DOE's

performance. Given these facts, together with the fact that DOE would not accept any of DCP's SNF until at least 2006, PG&E cannot establish, on the existing record, that performance by DOE at the 1987 ACR acceptance rates would have precluded the need for additional storage at DCP.

In addition, PG&E seeks to introduce evidence regarding its actual discharges in 2007 as further evidence that DOE's performance at the 1987 ACR acceptance rates would preclude the need for an ISFSI at DCP. See Pl.'s Stmt. at 23 (discussion of "actual discharge data"). However, the Court should not even entertain such evidence in its consideration of this matter. In its decision, the Court's inquiry was properly focused upon what PG&E understood to be its storage constraints when it made decisions to pursue dry storage at DCP. PG&E I, 73 Fed. Cl. at 425 ("PG&E would have been required in the ordinary course of business to construct additional at-reactor storage at Diablo Canyon in order to prevent it from reaching capacity in 2006 even if DOE had performed . . ."). While PG&E may be allowed to present analyses based upon the existing record regarding the space constraints that it would have faced at DCP had DOE performed under 1987 ACR rates, PG&E should not be allowed to present evidence regarding those constraints after those decisions were made or after the trial concluded. See, e.g., Florida Power, 56 Fed. Cl. at 560.

PG&E also claims that the entirety of its DCP ISFSI costs are now attributable to DOE's nonperformance. Pl.'s Stmt. at 20. PG&E's bald assertion is flawed in at least two respects. First, PG&E's contention invites the Court to make a determination about DOE's performance obligations after the first 10 years of the program. As explained above, neither this Court nor the Federal Circuit has established the scope of DOE's obligations under the Standard

Contract beyond the first 10 years contained in the 1987 ACR. Second, the documentary evidence shows that PG&E recognized real benefits from the construction of an ISFSI at DCP, including the acceleration of DCP's decommissioning and lower decommissioning costs. See PX 185 at 12; see also PX 284 at 1. Accordingly, PG&E cannot now claim that the need to construct the DCP ISFSI was solely caused by DOE's nonperformance.

PG&E also contends that it could have met its additional storage needs through the application of the +/- 20 percent provision in the contract or the use of exchanges. Pl. Stmt. at 23. As discussed above, PG&E did not identify the theory of +/- 20 percent during the original trial proceedings and, therefore, the Federal Circuit's mandate acts to bar PG&E from raising this issue for the first time upon remand.⁹ Tronzo, 236 F.3d at 1349.

Alternatively, PG&E argues that it could have transhipped fuel between DCP's two spent fuel pools, reduced the amount of fuel discharged, impinged upon its full core reserve, or used a "very small temporary rack." Pl.'s Stmt. at 23 n.8. These contentions are new and were not raised by PG&E in the initial trial proceeding and, therefore, should not be considered by the Court for the first time upon remand. In any event, these contentions belie PG&E's unsupported assertion that DOE's acceptance at the rates set forth in the 1987 ACR would have prevented the need for DCP to pursue additional storage options. Rather, PG&E's contentions indicate that the showing of causation on this issue will be close and will require careful analysis by the Court.

⁹ Even if the Court were to hold that PG&E is not barred by the mandate rule from basing its causation showing upon the +/- 20 percent provision, this provision would not enable PG&E to establish causation. The adjustments of +/- 20 percent were subject to DOE's approval in the ADS process and would have affected the allocations available to another utility. See PX 54, Art. V. B & C; see also PX 96 at 14.

PG&E also must show that it would not have needed the temporary racks had DOE performed at the 1987 ACR rate. Yet, given PG&E's claim that it could have obtained additional storage through the installation of a "very small" temporary rack in conjunction with other methods, it is not clear that PG&E can make such a showing. Instead, the Court likely will find that PG&E would have had to install the temporary racks that it claims as damages to meet its storage needs prior to DOE's first acceptance of SNF at DCP. With this finding, the costs of the temporary racks will be PG&E's costs, not damages owed by the Government.

2. Given The Allocations Set Forth In The 1987 ACR, PG&E Would Have Incurred The Costs To Study Storage Options If DOE Had Timely Performed

PG&E's claim also includes \$1,451,091 in costs for its DCP storage options evaluation. Pl.'s Stmt. at 25. In its initial decision, this Court found that, "[b]ecause Diablo Canyon would reach capacity in or around 2006, absent the Government's partial breach, PG&E still would have been obligated in the regular course of business to evaluate its storage options at Diablo Canyon." PG&E I, 73 Fed. Cl. at 428. Because PG&E's first acceptance of SNF under the 1987 ACR rates is no earlier than 2006, the Court's analysis and decision should stand.

As this Court found, PG&E projected in 1993 that it would lose capacity in 2006 in both DCP spent fuel pools. Id. at 423. In 1993, PG&E could have seen its projected allocations in the 1987 ACR document and known that the timing of those allocations would have been close. Moreover, PG&E projected in 1993 that it would lose full core reserve to load casks due to the "exclusion zone" in its NRC license in 1997. See PX 185 at PDCP0001711-2; see also PX 284 at PDCP0016154. These facts, together with DCP's need to maintain capacity to continue operations at the plant, show that PG&E still would have needed to study its storage options at

DCPP. PG&E I, 73 Fed. Cl. at 423 (citing testimony of Mr. Womack that “[i]f the pools at Diablo were to fill to capacity, . . . PG&E would have not other choice but to shut the power plant down with severe ramifications to the state.”) Therefore, the Court, in essence, can replace “absent the Government’s partial breach” with “performance at the 1987 ACR rate” with regard to its determination regarding PG&E’s entitlement for these damages. Upon this basis, the Government seeks judgment upon the existing record as to this damages claim.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court reject out-of-hand the following two categories of damages claimed in PG&E’s statement of damages as barred from consideration by this Court on remand under the “mandate rule”: (1) \$889,517 in costs associated with PG&E’s investment in PFS; and (2) \$919,420 in costs for removing the HBPP ventilation stack. Similarly, we request that the Court decline to revisit PG&E’s previously rejected “exchanges” theory, which PG&E attempts to resurrect on remand in part to support its additional claim for \$4.7 million in HBPP SAFSTOR costs, because the Federal Circuit’s decision in this case did not upset the Court’s ruling on this matter. We also request that the Court not allow PG&E to raise new arguments on remand, such as those relying on shutdown reactor priority and the +/- 20-percent provisions that PG&E did not raise prior to this Court’s original judgment. We further request that the Court grant the Government’s motion for entry of judgment in the Government’s favor upon the existing record upon the following three categories of damages claims: (1) \$1,599,841 in HBPP ISFSI costs relating to the storage of its GTCC; (2) \$38,678,000 in HBPP SAFSTOR costs associated with maintaining its GTCC in the

spent fuel pool for 2000 through 2004; and (3) \$1,451,091 in costs for its DCPD storage options evaluation. With respect to the remaining categories of damages claims, we request that the Court decide these items based upon the existing evidentiary record in this remand proceeding.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

OF COUNSEL:

JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

MARIAN E. SULLIVAN
Senior Trial Counsel

LISA L. DONAHUE
ANTHONY W. MOSES
SCOTT SLATER
Trial Attorneys
Commercial Litigation Branch

April 2, 2009

s/ Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Assistant Director

s/ Seth W. Greene
SETH W. GREENE
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Attention: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Tele: (202) 353-4175
Fax: (202) 307-2503

Attorneys for Defendant

APPENDIX

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PACIFIC GAS & ELECTRIC COMPANY,)	
)	
Plaintiff.)	
)	No. 04-0074C, into which has been
v.)	consolidated No. 04-0075C
)	(Judge Hewitt)
THE UNITED STATES,)	
)	
Defendant.)	

**PLAINTIFF'S RESPONSES TO DEFENDANT'S
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS ON REMAND**

Pursuant to RCFC 34, Pacific Gas & Electric Co. ("PG&E") responds to the government's first set of requests for production of documents on remand ("Requests") served on PG&E February 24, 2009.

GENERAL OBJECTIONS

1. PG&E objects to the Requests to the extent they seek documents in the possession of persons or entities other than PG&E or otherwise outside the possession, custody and control of PG&E. PG&E further objects to the government's definition of "Plaintiff," "PG&E," "you," "your," and "yourself" to include parties that are not a plaintiff in this action. PG&E will respond to these Requests for itself, but does not (and cannot) respond to them for any "present or former officers, employees, agents, attorneys, or representatives and every person acting upon [PG&E's] behalf and/or connected with plaintiff in the context of the matters at issue in this action."

2. PG&E objects to, and will disregard, the government's definition of "person" and "individual" to the extent that definition purports to include "all respective officials, directors, officers, employees, representatives, independent contractors, investigators, consultants, agencies, or agents, whether or not still alive or in existence."

3. PG&E objects to the definition of "document" to include "any preliminary drafts of any documents or any working papers related thereto" to the extent that it implicates drafts and/or working papers of PG&E's experts and departs from the limited expert discovery as provided by RCFC 26(b)(3). PG&E also objects to the definition of "document" as unduly burdensome to the extent it includes email and other electronic media. PG&E has a very substantial volume of such material that cannot be practically be searched, at least in the absence of narrowing criteria.

4. PG&E objects to the definition of "Relating to" to the extent it means "supporting," "contradicting" or "in any way pertaining to the subject specified" as these words and phrases are vague.

5. PG&E objects to the instruction under paragraphs C and D as exceeding what is required by RCFC 26 and 34. The rules do not call for PG&E to "answer" the government's requests for the production of documents. Instead, PG&E is to respond to the request and to make non-privileged, responsive documents available to the government.

6. PG&E objects to that part of instruction paragraph E requesting production of documents no longer in PG&E's possession as being beyond what is permitted by RCFC 26 and 34. PG&E further objects to the instruction in paragraph E to provide information regarding documents that are unavailable as exceeding what is required by RCFC 26 and 34.

7. PG&E objects to the instructions under paragraph F as exceeding what is required by RCFC 26 and 34. To the extent PG&E claims a privilege or protection from the production of documents that would otherwise be produced consistent with these general objections, PG&E will describe such documents, if any, in a separate privilege log in a manner sufficient to enable the government and the Court to ascertain the propriety of the claim of privilege or protection. PG&E also objects to the instructions under paragraphs E and F as unduly burdensome, to the extent they seek production, or logging as privileged or protected from production, communications between PG&E and its counsel in this case, because virtually all such communications relate to this or other litigation, and are thus protected by the attorney-client privilege and/or the work-product doctrine. Further, PG&E objects to identifying, producing or logging documents or communications within the attorney working files and/or correspondence files of attorneys used by PG&E for purposes of preparing its rate cases before the California Public Service Commission or other rate making bodies. Because the vast majority of these documents are protected under the attorney-client privilege or work-product doctrine, the inspection and production of such documents and communications would be unduly burdensome.

8. PG&E objects to all other instructions, definitions and the requests to the extent that they exceed the discovery permitted by RCFC 26 and 34.

9. PG&E objects to the Requests to the extent that they seek publicly available documents already available to the government. Such documents include, but are not limited to, formal pleadings and/or other documents filed by or on behalf of PG&E with the California Public Service Commission, the Federal Energy Regulatory Commission or other ratemaking

bodies in the course of formal rate adjustment proceedings, official DOE documents, industry newsletters and standard reference material.

10. PG&E objects to producing copies of documents that do not differ materially from the copy produced because production of such documents would be unduly burdensome.

11. PG&E objects to instruction H insofar as it requests production of documents pre-dating 1980. Such documents are beyond the scope of discovery under RCFC 26 and 34 and/or production of such documents would be unduly burdensome.

12. PG&E's production of documents is not intended to waive, and should not be construed as waiving the right to object to the relevance or admissibility as evidence of any documents provided, or the subject matter thereof.

13. PG&E also objects to the Requests to the extent they call for the production of documents already provided to the government in PG&E's initial disclosures under Rule 26(a) or in previous document production(s) in this case, and further as being beyond the scope of RCFC 26 and unduly burdensome to the extent they request PG&E to "identify with specificity where in the prior production" such previously-produced documents may be found.

14. Notwithstanding the definitions suggested by the government, except where a different meaning is indicated by context, PG&E's responses use the terms "SNF," "spent fuel," "spent nuclear fuel," "spent fuel and high-level waste," "SNF and HLW," interchangeably to cover all material DOE is obligated to accept under the parties' contract.

15. PG&E objects to the Requests to the extent that they purport to require PG&E to provide an analysis and/or other document summary that does not currently exist.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1

All documents, electronic files, and analyses that support, refute, or otherwise relate to PG&E's claims for damages in this case, as described in PG&E's Statement of Damages Claims, including any and all documents, electronic files, and analyses supporting, refuting, or otherwise relating to the information set forth on each of Revised Table 1 at A126, Revised Table 2 at A1, and Revised Table 3 at A2 of PG&E's Statement of Damages Claims.

SPECIFIC OBJECTIONS

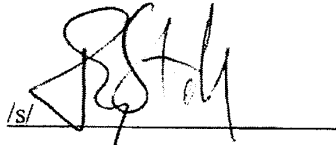
PG&E objects to this request in that the phrases "relate to" and "relating to" are vague. In addition, this request is vague and unduly burdensome in that it fails to describe a category of documents with reasonable particularity, as it appears to encompass any document relating to any of the projects on which PG&E has incurred costs it claims as damages.

RESPONSE

Subject to its general and specific objections, PG&E responds as follows: other than a few additional documents PG&E will produce, and the Federal Circuit opinion which Defendant has in its possession, all relevant, non-privileged documents have already been produced with its initial disclosures or in previous document production(s).

REQUEST NO. 2

All documents, electronic files, and analyses used to generate, prepare, or otherwise create Revised Table 1 at A126 of PG&E's Statement of Damages Claims.

A handwritten signature in black ink, appearing to read "J. Stouck", is written over a horizontal line. To the left of the signature, the text "/s/" is written.

JERRY STOUCK
Greenberg Traurig, LLP
2101 L Street, NW
Suite 1000
Washington, DC 20037
(202) 331-3100 (Telephone)
(202) 261-4751 (Facsimile)
Counsel of Record for Pacific Gas and Electric Co.

Of Counsel:

Robert L. Shapiro, Esq.
GREENBERG TRAURIG, LLP

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Plaintiff's Responses to Defendant's First Set of Document Requests on Remand to be served by causing them to be placed in the U.S. mail and faxing and emailing a copy this 24th day of March 2009 to:

SETH GREENE
Trial Attorney
United States Department of Justice
Civil Division
Commercial Litigation Branch
Attn: Classification Unit
8th Floor
1100 L Street, NW
Washington, D.C. 20530
Telephone: (202) 353-4175
Facsimile: (202) 307-2503
seth.greene@usdoj.gov


Maggie Sklar

Mar-26-2009 10:59 AM Greenberg Traurig LLP -WDC 202-331-3101

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PACIFIC GAS & ELECTRIC COMPANY,)	
)	
Plaintiff,)	
)	
v.)	No. 04-0074C, into which has been
)	consolidated No. 04-0075C
THE UNITED STATES,)	(Judge Hewitt)
)	
Defendant.)	

**PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES
AND FIRST SET OF REQUESTS FOR ADMISSION
ON REMAND TO PLAINTIFF PACIFIC GAS & ELECTRIC COMPANY**

Pursuant to Rules 33, 34 and 36 of the Rules of the United States Court of Federal Claims ("RCFC"), Plaintiff, Pacific Gas & Electric Company ("PG&E") hereby responds to the government's first set of interrogatories and requests for admission on remand served on PG&E February 24, 2009.

GENERAL OBJECTIONS

PG&E states the following general objections:

1. PG&E objects to the defendant's instruction at page 1, which purports to require PG&E to supplement its responses to the Interrogatories and Requests "from time to time, but not later than 10 days after such additional information has been obtained." This instruction seeks to impose obligations that go beyond those that are required under RCFC 26(e).
2. PG&E objects to any interrogatories that seek information or documents in possession of corporations or entities other than PG&E or otherwise outside the possession, custody and control of PG&E. PG&E further objects to the defendant's definition of "Plaintiff," "you," "your," and "yourself" to include parties that are not a plaintiff in this action. PG&E will answer these interrogatories but does not (and cannot) answer them for any "present or former

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officers, employees, agents, attorneys, or representatives and every person acting upon [PG&E] behalf and/or connected with plaintiff in the context of the matters at issue in this action.”

3. PG&E objects to the definition of “document” to include “any preliminary drafts of any documents or any working papers related thereto” as it implicates drafts and/or working papers of PG&E experts and departs from the limited expert discovery as provided by RCFC 26(b)(3).

4. PG&E objects to the definition of “identify” and “identity” (assuming a misspelling, the government’s interrogatories repeat “identify”) and the corresponding instructions to these definitions under paragraphs A.5(a)-(e) as they purport to require PG&E to seek, gather, and/or provide information and documents already in the possession of, or equally available to the defendant, or impose obligations beyond those that are provided by RCFC 26 and 33. PG&E also objects to definition A.5(b) of “identify” as oppressive, unduly burdensome and seeking information that is neither relevant nor reasonably calculated to lead to the discovery admissible evidence. For example, the government has no need for the addresses and telephone numbers (particularly home addresses and phone numbers) of PG&E personnel, as all contact with these individuals concerning this litigation should be through counsel.

5. PG&E objects to the instructions under paragraphs A.6(a)-(b) on the ground that the instructions constitute a series of interrogatories that should be propounded individually where applicable. In its current form this instruction is overly broad and unduly burdensome. PG&E will provide in its responses the information specifically sought for each individual Interrogatory (to the extent PG&E possesses such information and it is properly discoverable), and not the information included as part of paragraphs A.6(b).

6. PG&E objects to providing documents already in the possession of, or equally

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available to the defendant and the burden of deriving or ascertaining the information is substantially the same for Plaintiff as it is for Defendant.

7. PG&E objects to instruction I as seeking information that is not relevant to the subject matter of this action, not reasonably calculated to lead to the discovery of admissible evidence. In addition, PG&E reserves all evidentiary objections including relevance, prejudice, and hearsay concerning each of PG&E's responses to the interrogatories. PG&E also objects to instruction I insofar as it requests information pre-dating 1980. Such information is beyond the scope of discovery under RCFC 26 and 34 and/or providing such information would be unduly burdensome.

8. PG&E objects to all other instructions and definitions to the extent that they exceed the discovery permitted by RCFC 26, 33, 34, and 36.

9. PG&E objects to the interrogatories that seek publicly available documents or information already available to the government. Such information includes, but is not limited to, formal pleadings and/or other documents filed by or on behalf of PG&E, official DOE documents, industry newsletters and standard reference materials.

10. PG&E objects to the interrogatories that call for the disclosure of information that is protected by the attorney-client privilege, or any other applicable privilege, immunity or protection. All interrogatories will be read to exclude discovery of information protected by the attorney-client privilege or work product doctrine. Provision of any such information by PG&E during the litigation is inadvertent and should not be construed as a waiver of any such privilege or of any other ground for objection to discovery with respect to such information.

11. PG&E objects to instruction E seeking separate responses to each subpart as unduly burdensome. For example, many of the subparts requests that particular information be

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included in the description. It would be unduly burdensome to repeat such information both in the description and in a separate subpart. On an interrogatory-by-interrogatory basis, PG&E will, subject to its objections, respond to the interrogatories in a manner that coherently and efficiently supplies the information requested.

12. PG&E's answers to interrogatories are not intended to waive, and should not be construed as waiving the right to object to the relevance or admissibility as evidence of any information or documents provided, or the subject matter thereof.

13. PG&E objects to instructions C, G and H as exceeding what is required of plaintiff by RCFC 33.

14. Except where a different meaning is indicated by context, the responses use the terms "SNF," "spent fuel," "spent nuclear fuel," "spent fuel and high-level waste," "SNF and HLW," interchangeably to cover all ⁱⁱⁱmaterial DOE is obligated to accept under the parties' contract.

15. PGE objects to the interrogatories and requests to the extent that they purport to require PG&E to provide an analysis and/or other document summary that does not currently exist.

16. PG&E objects to the requests for admission as unduly burdensome, vague, and argumentative. Further, PG&E objects to the requests for admission to the extent that they seek admissions as to legal conclusions.

17. PG&E objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues ⁱⁱⁱin the requests for admission. PG&E's response that it will produce information in connection with a particular request for admission is not intended to

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indicate that PG&E agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the requests for admission, or that such implications or characterizations are relevant to this action.

INTERROGATORY RESPONSES

INTERROGATORY NO. 1

Identify all persons or individuals, including, but not limited to, current and former PG&E employees and any and all consultants and/or expert witnesses, involved in the preparation of PG&E's Statement of Damages Claims.

SPECIFIC OBJECTIONS

PG&E objects that the word "involved" is vague. PG&E further objects that the question calls for litigation work product and attorney client privileged information.

RESPONSE

Subject to PG&E's general and specific objections, PG&E responds as follows: PG&E's Statement of Damages Claims was drafted by counsel, and communications with counsel are privileged. Persons with knowledge of the facts set forth in the Statement of Damages Claims include PG&E's previous trial witnesses, and particularly Larry Womack, Bob Kapus and Jearl Strickland.

INTERROGATORY NO. 2

Identify all analyses relating to any and all claims for damages considered and/or reviewed by all persons or individuals, including, but not limited to, current and former PG&E employees and any and all consultants and/or expert witnesses, in connection with, or as part of, the preparation of PG&E's Statement of Damages Claims.

SPECIFIC OBJECTION

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PG&E objects to this interrogatory as vague.

RESPONSE

Subject to PG&E's general and specific objections, PG&E responds as follows: To the extent PG&E understands this interrogatory, no such analyses exist.

INTERROGATORY NO. 3

State whether you contend that, had it not partially breached the Standard Contract, DOE would have accepted GTCC waste from utilities on the same schedule as SNF. If so, describe how PG&E's Statement of Damages Claims took into account the impact that this acceptance of GTCC waste would have had upon the acceptance of SNF from PG&E.

SPECIFIC OBJECTIONS

PG&E objects that the phrase "same schedule" is vague. PG&E further objects that the interrogatory, in its entirety, is vague because it does not specify any time frame. PG&E also objects to this interrogatory as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence because the interrogatory asks for PG&E's contention as to whether DOE would have accepted GTCC waste from other utilities on the same schedule as SNF, and PG&E is not seeking damages for any utility other than itself. Also, contrary to the implication of the interrogatory, the Court need not determine a comprehensive schedule of GTCC waste acceptance in order to determine PG&E's damages.

RESPONSE

Subject to PG&E's general and specific objections, PG&E responds as follows: This interrogatory is answered in full in PG&E's Statement of Damages, at pp.15-18. The relevant discussion from that document is reiterated (with minor editing) below:

The Federal Circuit has now held that the government has had a performance obligation with respect to GTCCC waste. Accordingly, by this

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INTERROGATORY NO. 4

If you contend that, had it not partially breached the Standard Contract, DOE would have accepted GTCC waste from utilities on the same schedule as SNF, for each year from 1998 through 2007, set forth the total amount of SNF and the total amount of GTCC waste that DOE would have accepted from the industry and state whether you utilized these acceptance rates in formulating PG&E's Statement of Damages Claims.

SPECIFIC OBJECTIONS

PG&E objects that this interrogatory seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and is unduly burdensome to the extent it asks PG&E to answer how much GTCC waste DOE would have accepted from other utilities for each year from 1998 through 2007. Also, contrary to the implication of the interrogatory, the Court need not determine a comprehensive schedule of GTCC waste acceptance in order to determine PG&E's damages.

RESPONSE

Subject to PG&E's general and specific objections, PG&E responds as follows: The DOE would have picked up any GTCC waste as needed from shutdown reactor sites no later than when it picked up the last of their spent fuel. For PG&E, the GTCC waste would have been accepted in 1998.

INTERROGATORY NO. 5

State whether you addressed GTCC waste in any decommissioning studies conducted or decommissioning estimates made with respect to your nuclear facilities. If so, identify the study or estimate, explain where and how GTCC waste was addressed in that study or estimate, and,

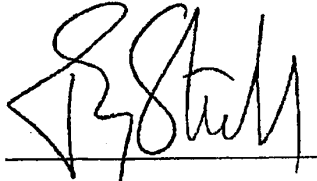
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RESPONSE

Subject to its general and specific objections, PG&E responds as follows: To the extent PG&E understands the request, it is denied.

Dated March 26, 2009

A handwritten signature in black ink, appearing to read "J. Stouck", written over a horizontal line.

JERRY STOUCK
Greenberg Traurig, LLP
2101 L Street, NW
Suite 1000
Washington, DC 20037
(202) 331-3100 (Telephone)
(202) 261-4751 (Facsimile)
Counsel of Record for Pacific Gas and Electric Co.

Of Counsel:

Robert L. Shapiro, Esq.
GREENBERG TRAURIG, LLP

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VERIFICATION

The preceding interrogatory answers are based on a review of business records and the personal recollections of a number of employees and contractors. PG&E has made a good faith effort to supply true and correct responses to the interrogatories. I have reviewed each response and believe each to be true and correct.

I declare under penalty of perjury that the foregoing statement is true and correct

3/25/09
Date

Eileen O. Chan
Eileen Chan
Assistant Corporate Secretary

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-5046

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in cases Nos. 1:04-cv-0074 & 1:04-cv-0075, Judge Emily C. Hewitt

BRIEF OF APPELLANT

Jerry Stouck
Robert L. Shapiro
GREENBERG TRAURIG LLP
800 Connecticut Avenue, NW
Suite 500
Washington, DC 20006
(202) 331-3100

Of Counsel

April 5, 2007

Carter G. Phillips
Virginia A. Seitz
Ruthanne M. Deutsch
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8200

*Attorneys for Appellant
Pacific Gas and Electric Company.*

STATEMENT OF JURISDICTION

This is a timely appeal from the Court of Federal Claim's ("CFC's") decision in *Pacific Gas & Electric Co. v. United States*, 73 Fed. Cl. 333 (2006), reprinted in A00001-A00106. Final judgment was entered on October 13, 2006. The CFC exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1491(a)(1).

This Court has exclusive jurisdiction over appeals from final decisions of the CFC under 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES

1. Whether the CFC's construction of the contract between the Department of Energy ("DOE") and Pacific Gas and Electric Co. ("PG&E") – that PG&E would pay millions in fees to resolve its Spent Nuclear Fuel ("SNF") storage problem by January 31, 1998, and DOE, in exchange, would unilaterally decide the rate at which it would accept SNF based on circumstances created by the government many years after contract formation – is wrong as a matter of law?

2. Whether the CFC's exclusion of PG&E's expert testimony concerning "exchanges" of acceptance allocations among nuclear utilities and its consequent decision that PG&E would not have used "exchanges" was an abuse of discretion under established law?

achieve “absolute exactness or mathematical precision” in evaluating damages.

Bluebonnet Sav. Bank, FSB v. United States, 266 F.3d 1348, 1355 (Fed. Cir. 2001).

PG&E and the rest of the nuclear utility industry have paid billions in contract fees and gotten nothing. *See Ind. Mich.*, 88 F.3d at 1276 (analogizing to Yiddish saying, “Here is air; give me money”). PG&E and its California ratepayers should not be forced to bear the financial burden of the government’s breach. This Court should hold that under the Standard Contract, the government was obligated to accept sufficient SNF to obviate PG&E’s need to incur additional at-reactor storage costs after January 1998, and should thus vacate the CFC’s decision and remand with instructions that PG&E’s damages should be recalculated based on the correct contract interpretation.

II. EXCLUSION OF GRAVES’ TESTIMONY WAS AN ABUSE OF DISCRETION, CONTRIBUTING TO THE CLEARLY ERRONEOUS FINDING THAT PG&E WOULD NOT ENGAGE IN EXCHANGES.

The CFC did not “doubt ‘[t]hat a market would develop around the exchange provision of the Standard Contract,’” yet nonetheless found “the preponderance of the credible evidence adduced at trial does not indicate that PG&E would have used the exchanges provision, or how it would have used it.” A00073 (citation omitted). But the CFC excluded the most relevant evidence on these very issues – the expert testimony of Frank Graves, which the *Yankee* court

deemed “compelling.” *Yankee*, 73 Fed. Cl. at 303. The CFC’s exclusion of this highly relevant evidence was a clear abuse of discretion.

The CFC stated that the Graves’ testimony would not be “more helpful to the court . . . than that of the numerous percipient witnesses directly involved in the nuclear waste disposal program” A00093. But percipient witnesses testified to the facts that existed in the *breach world*, facts which are not relevant to the task of determining reasonable contract performance in the “but for” *non-breach* world. Graves’ economic model of the non-breach world, by contrast, was directly germane to this task. *See Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1270-71 (Fed. Cir.), *cert. denied*, 126 S. Ct. 344 (2005) (expert economic testimony can shed light on how markets would work in a non-breach world); *cf. Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 175 F.3d 18 (1st Cir. 1999) (economic models are often the only methodology available to understand what would happen in the non-breach world).

Graves would have provided an expert opinion on “an economic model of exchanges, swaps, purchases, and sale of DOE pick-up commitments based on the classic ‘invisible hand’ of economic market development.” *Yankee*, 73 Fed. Cl. at 299.¹³ In contrast to the breach-world evidence the CFC relied upon, *see* A00073,

¹³ His model would have also demonstrated the unreasonableness of the CFC’s characterization of the non-breach world by demonstrating that a low acceptance rate schedule similar to the 1991 ACR, when combined with collections made on

Graves' testimony demonstrates how the exchanges provision of the Standard Contract would have worked for PG&E had DOE performed as the contract requires. The CFC was reluctant "to engage in wholesale speculation" about hypothetical exchanges, *id.*, but absent Graves' testimony did precisely that. The CFC thus failed to fashion a remedy that gives content to the bargained-for exchanges provision of the parties' agreement. *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960). Graves' testimony provides just such content, and thus clearly meets the liberal standards of relevancy. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587, 591 (1993); Fed. R. Evid. 401.

In rejecting this testimony, the CFC did not find that Graves' methodology was unreliable or fundamentally flawed, as required by *Daubert*, 509 U.S. at 595. Instead, the CFC concluded that it was not sufficiently "connected to the facts of the case." A00519 (Pre-Trial Tr.). This finding is without merit. As the *Yankee* court explained in denying the government's motion to bar Graves' testimony:

Defendant's contract breach is established. That breach prevented the very market the government assails as speculative – the lack of realmarket data on the sale of allocation slots for the storage of spent nuclear fuel. By partially breaching the contract, defendant cannot exclude Graves' opinion on the grounds that there is no market data. There is no market data because the government's breach thwarted this possibility.

the basis of OFF priority, would result in industry-wide storage costs reaching "97% of breach case costs." A00467.

Yankee v. Atomic Elec. Co. v. United States, No. 98-1260, 2004 WL 1535686, at *4 (Ct. Fed. Cl. June 28, 2004). That economic models explain *hypothetical*, non-breach scenarios does not make them inadmissible. The acceptance rate scenarios used in the Graves' model were well-grounded in the record.¹⁴ The CFC did not question Graves' storage costs estimates, which were consistent with published studies. A00453-A00454 (Graves Rebuttal Report). The distribution of SNF across utilities, and the inefficient and scattered nature of deliveries that would result from use of OFF prioritization, were likewise in the record. *Compare* A05022 *with* A00403 (Graves Expert Witness Report); *see also infra*.

The CFC also rejected Graves' testimony on the clearly erroneous belief that his model relied on too many speculative assumptions – all of which, the CFC mistakenly believed, had to be true. A00093-A00094. The CFC's finding wrongly adopts the bald assertions of the government's counsel in its motion to exclude, *see* A00073, and completely disregards statements in Graves' testimony demonstrating the robustness of his model to changes in assumptions, *e.g.*, A00405, A00454-A00455. Such robustness was confirmed by the *Yankee* court, which found that

¹⁴ *See* A00391 (Graves Expert Witness Report), describing reliance on “the many DOE planning documents and studies . . . beginning with the 1985 Mission Plan and continuing through today, [that] use a steady-state acceptance rate of 3,000 MTU/year at a geologic repository . . . beginning at a lower rate and ramping up.” That the acceptance rate scenarios relied upon by Graves might themselves be subject to dispute is of no import to the admissibility of the expert testimony. *Micro Chem., Inc. v. Lextron Inc.*, 317 F. 3d 1387, 1392 (Fed. Cir. 2003).

Graves' "model would work even if only half the utilities participated." 73 Fed. Cl. at 299. Moreover, as this Court has noted, such challenges to the robustness of an economic model go to the weight of the evidence, not its admissibility, and are properly raised by cross-examination. *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1220-1221 (Fed. Cir.) (collecting cases), *cert. denied*, 127 S. Ct. 599 (2006).

Absent the Graves testimony, the CFC made the clearly erroneous finding that PG&E would not engage in exchanges by focusing on evidence from the breach-world, where exchanges would be "unlikely" and "expensive." A00073. But "*DOE's partial breach(es) thwarted the market.*" *Yankee*, 73 Fed. Cl. at 303 (emphasis added). The CFC's clearly erroneous finding that PG&E would not engage in exchanges also results from the CFC's improper framing of the issue as whether PG&E would have used exchanges under the 1991 ACR (itself a breach scenario), as opposed to correctly focusing on DOE's obligations (and incentives) to perform the Contract efficiently in the non-breach world. A00073-A00074 (deeming "contemporaneous evidence" from the early 1990s as "relevant to whether PG & E would have used the exchanges provision had DOE performed the Standard Contract"). Thus, the CFC ignored the weight of admitted evidence that exchanges and acceptance campaigns represented a "win-win" "situation [that] would benefit everyone." A01255 (Stuart Tr.). For example, a former DOE

official testified that DOE would “not only . . . approve, but encourage and assist” exchanges as “the OFF system is very, very inefficient.” A01014, A01011 (Bartlett). Others explained that, given the utilities’ experience with other secondary exchange markets, there was “no reason that PG&E or any other party for that matter would not seek exchanges.” A01629-A01630 (Womack); *see also* *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1572 & n.1 (Fed. Cir. 1997) (describing the operation of similar secondary exchange markets for uranium enrichment). Having insisted on inclusion of an Exchanges provision in the Contract, *see supra* at 10; *see also* A00015, it is utterly implausible to believe that PG&E would not avail itself of this contractual right, particularly when all contracting parties, including the government, stood to benefit from exchanges. *See Yankee*, 73 Fed. Cl. at 303-04.¹⁵

The CFC’s decision to exclude Graves’ expert testimony should be reversed, and its resulting holding that PG&E would not have engaged in exchanges should be vacated. This Court should remand with instructions that the CFC admit, and duly consider, the Graves testimony in determining PG&E’s damages.

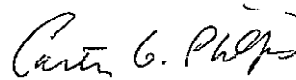
¹⁵ The CFC’s confusion on this issue is further demonstrated by its mistaken view that exchanges and acceptance campaigns are mutually exclusive. A00050. The opposite is true: exchanges provide the market mechanism that permits efficient pooling for collection by DOE via concentrated acceptance campaigns. *See* A00816 (Mills Tr.).

Act, 28 U.S.C. § 2501, is a jurisdictional bar to PG&E's future-damages claims. Given the draconian nature of this possible result and the availability of the Rule 54(b) mechanism to eliminate the risk, the court abused its discretion by denying PG&E's motion to amend its complaint and failing to certify the partial award of damages through 2004 under RCFC 54(b) while leaving the case open for trial of future damages. This Court should reverse and remand with instructions that the partial award be certified under Rule 54(b).

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the CFC, and remand the case for recalculation of damages under the correct legal standards.

Respectfully submitted,



Jerry Stouck
Robert L. Shapiro
GREENBERG TRAURIG LLP
800 Connecticut Avenue, NW
Suite 500
Washington, DC 20006
(202) 331-3100

Of Counsel

April 5, 2007

Carter G. Phillips
Virginia A. Seitz
Ruthanne M. Deutsch
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8200

*Attorneys for Appellant
Pacific Gas and Electric Company.*

~~Davidson~~
Lester, H 7050

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-5046

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in cases Nos. 1:04-cv-0074 & 1:04-cv-0075, Judge Emily C. Hewitt

REPLY BRIEF OF APPELLANT

Jerry Stouck
Robert L. Shapiro
GREENBERG TRAURIG LLP
800 Connecticut Avenue, NW
Suite 500
Washington, DC 20006
(202) 331-3100

Of Counsel

September 10, 2007

Carter G. Phillips
Virginia A. Seitz
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8200

*Attorneys for Appellant
Pacific Gas and Electric Company.*

154-04-0074
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1998” (quoting *Ind. Mich.*, 422 F.3d at 1375)). PG&E’s mitigation expenses were substantially caused by DOE’s failure to perform. *Id.* at 16-17; A11311-11327 (PG&E post-trial brief detailing testimony and evidence showing mitigation expenses, such as expanding Diablo Canyon’s SNF pools that had been designed to accommodate discharge through about 2006); *see also, e.g.*, A00077 (CFC finding that “absent the government’s breach of the parties’ Standard Contract, plaintiff would not have had to construct the ISFSI at Humboldt Bay”). And, the CFC has already concluded that virtually all of PG&E’s costs were commercially reasonable. *See, e.g.*, A00076, A00079, A00080, A00085.

Accordingly, the CFC should have awarded PG&E all foreseeable, commercially-reasonable costs caused by DOE’s breach. As the Government observes, the CFC awarded PG&E only half of the damages it sought through 1994. Br. 3. And, going forward, on the CFC’s view, PG&E would receive even less – approximately 22% of its costs for its onsite storage at Diablo, for example, unless or until DOE performs in 2017. *See* A00086 n.78; PG&E Br. at 19 n.5. PG&E already paid millions for this SNF disposal through contributions to the Nuclear Waste Fund, and should not be required to pay again.

II. EXCLUSION OF GRAVES’ TESTIMONY WAS AN ABUSE OF DISCRETION, RESULTING IN A CLEARLY ERRONEOUS FINDING THAT PG&E WOULD NOT HAVE ENGAGED IN EXCHANGES.

In its opening brief, PG&E demonstrated that the CFC abused its discretion

by excluding Frank Graves' expert testimony on an economically reasonable acceptance rate and "an economic model of exchanges, swaps, purchases, and sale of DOE pick-up commitments based on the classic 'invisible hand' of economic market development." *Yankee*, 73 Fed. Cl. at 299. Graves' testimony demonstrated how the exchanges provision of the Standard Contract would have worked in a non-breach world.

The Government first responds that the CFC did not abuse its discretion by "excluding Mr. Graves' proffered testimony regarding a 'reasonable' SNF acceptance rate because Mr. Graves is not an expert on that issue." Br. 48-49 (capitalization omitted). Graves' testimony, however, was proffered not on the Contract's meaning, but to prove an economically reasonable rate and model the exchange market for SNF acceptance in a non-breach world. Graves' testimony could not have been cumulative because no other witness testified on these points.

Second, while essentially acknowledging that Graves utilized a "sound underlying model," the Government argues that the CFC properly excluded Graves' exchange model as based on "speculative" assumptions, specifically *full* DOE acceptance of exchanges, *full* utility participation in the exchange system, perfect competition and efficient-market pricing. *Id.* at 51-52. In fact, Graves' report reveals that his conclusions did not depend on extreme assumptions and that they did not change with altered assumptions, *see, e.g.*, A00405, A00465; PG&E

Br. 49 (citing record). *See also Yankee*, 73 Fed. Cl. at 299 (“model would work even if only half the utilities participated”).

Moreover, as the *Yankee* court concluded, Graves’ model was firmly founded on “real world” facts. *See Yankee Atomic Elec. Co. v. United States*, 2004 WL 1535686, at *5 (Fed. Cl. June 28, 2004) (“[f]actors used in reaching Graves’ conclusions are ‘real world’ figures”); A0387-A0395 (Graves report relying upon DOE publications and testimony in SNF hearings); A01255; A01629-A01630; PG&E Br. 49 & n.14. It was, indeed, the Government’s breach that “thwarted th[e] possibility” of real market data. *Yankee*, 2004 WL 1535686, at *4. In any event, challenges to a model’s assumptions and the underlying facts go to the weight, not the admissibility, of evidence. PG&E Br. 50.

Finally, the Government asserts that any error in excluding Graves’ testimony was harmless because PG&E would not have engaged in exchanges. US Br. 53. As already shown, the testimony allegedly supporting this proposition concerns the use of exchanges in a *post-breach* world and is thus irrelevant to whether PG&E would have engaged in exchanges absent the breach. PG&E Br. 50-51. In a non-breach world, exchanges represented a “win-win” “situation that would benefit everyone.” A01255 (Stuart Tr.); PG&E Br. 51. For example, without exchanges, DOE would have collected one cask of SNF from PG&E’s

Humboldt plant in 1999, 2000, and 2001; exchanges would have permitted the simultaneous collection of three casks.

The CFC's arbitrary exclusion of Graves' testimony led to its clearly erroneous conclusion that PG&E would not have engaged in exchanges in the non-breach world. Graves' testimony should be admitted and considered in determining PG&E's damages, as it was in *Yankee*.

III. THE CONTRACT COVERED ACCEPTANCE OF GTCC WASTE.

Contrary to the Government's characterization (Br. 54), PG&E does not contend that the NRC defines GTCC waste as HLW. Instead, PG&E showed that the Standard Contract encompasses disposal of GTCC waste, as the CFC in the companion *Yankee* case held. PG&E Br. 53-54. The Government fails to undermine PG&E's natural contract reading.

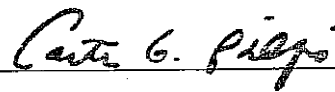
First, the Government observes that although NRC's rules define GTCC waste as requiring permanent isolation (bringing it within the Standard Contract's definition), NRC has also opined that GTCC waste is *not* HLW under the NWPA. Br. 57. As explained in PG&E's opening brief, the fact that GTCC waste does not satisfy NRC's separate regulatory definition of HLW is irrelevant. Br. 53-55. NRC lacks authority to interpret the Contract whose definition of HLW governs here. For the same reason, the argument that NRC is entitled to *Chevron*-type deference, US Br. 58, is meritless.

PG&E satisfied Rule 54(b)'s requirements, this is no reason to deny relief. Moreover, if a court lacks jurisdiction of time-barred claims, *see John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354-55 (Fed. Cir. 2007), *cert. granted*, 127 S. Ct. 2877 (2007) (No. 06-1164), *Indiana Michigan* may not govern future cases. The CFC abused its discretion by failing to eliminate the risk that PG&E's future damages claims might be barred. *Cf. Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) (transfer, instead of dismissal, is appropriate to prevent limitations bar).

CONCLUSION

The CFC's decision should be vacated. The matter should be remanded for recalculation of damages under the correct legal standards. The CFC should be ordered to retain jurisdiction over future damages claims.

Respectfully submitted,



Jerry Stouck
Robert L. Shapiro
GREENBERG TRAURIG LLP
800 Connecticut Avenue, NW
Suite 500
Washington, DC 20006
(202) 331-3100

Carter G. Phillips
Virginia A. Seitz
Ruthanne M. Deutsch
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8200

Of Counsel

*Attorneys for Appellant
Pacific Gas and Electric Company.*

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CERTIFICATE OF FILING

I hereby certify that on this 2nd day of April, 2009, a copy of the foregoing
“DEFENDANT’S RESPONSE TO PLAINTIFF’S STATEMENT OF DAMAGES DUE, AND
ISSUES TO BE ADDRESSED, ON REMAND, AND MOTION FOR ENTRY OF JUDGMENT
UPON THE EXISTING RECORD” was filed electronically. I understand that notice of this
filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may
access this filing through the Court’s system.

s/ Seth W. Greene